

No. 11126

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
a corporation,

Appellee.

APOSTLES ON APPEAL

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

OCT 3 - 1945

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS:

For Appellant:

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United States Attorney

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634 South Spring Street

Los Angeles 14, Calif.

For Appellee:

LAWLER FELIX & HALL

JOHN M. HALL

MARCUS MATTSON

Standard Oil Building

Los Angeles 15, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

CITATION

United States of America, ss.

To Standard Oil Company of California, a corporation,
and Messrs. Lawler, Felix and Hall, its attorneys,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 10th day of July, A. D. 1945, pursuant to an order allowing appeal filed on May 31, 1945, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 3490-BH, Central Division, wherein United States of America is appellant and you are appellee to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Ben Harrison, United States District Judge for the Southern District of California, this 31st day of May, A. D. 1945, and of the Independence of the United States, the one hundred and sixty-ninth.

BEN HARRISON

U. S. District Judge for the Southern District of California.

Service of a copy of the foregoing Citation is acknowledged this 31st day of May, 1945, together with copy each of Petition for Appeal, Assignment of Errors and Order Allowing Appeal. Lawler, Felix & Hall, John M. Hall, Marcus Mattson, by John M. Hall, Attorneys for Appellee.

[Endorsed]: Filed May 31, 1945. [2]

In the District Court of the United States for the
Southern District of California
Central Division

In Admiralty No. 3490-BH

STANDARD OIL COMPANY OF CALIFORNIA,
a corporation,

Libelant,

v.

UNITED STATES OF AMERICA and KEYSTONE
SHIPPING COMPANY, a corporation,

Respondents.

LIBEL IN PERSONAM

To the Honorable, the Judges of the United States District Court, for the Southern District of California, Central Division:

The libel of Standard Oil Company of California, a corporation, against United States of America and Keystone Shipping Company, a corporation, respectfully shows:

1. Libelant Standard Oil Company of California is now and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to transact business in California.

2. Respondent Keystone Shipping Company is now and at all times herein mentioned has been a corporation organized and existing [3] under and by virtue of the laws of one of the states of the United States.

3. The vessel "S. S. Egg Harbor" is now and at all times herein mentioned has been employed as a merchant

vessel and owned and operated by United States of America, by and through War Shipping Administration, a department and agency of United States of America.

4. Said vessel "S. S. Egg Harbor" is within this district, to wit, at the port of San Pedro, California.

5. This libel is filed under the provisions of the Suits In Admiralty Act (March 9, 1920, c. 95, 41 Stat. 525, Title 46 U. S. C., Sec. 741-752 inc.) and libelant hereby elects, in accordance therewith, to have this suit proceed in accordance with the principles of a libel in rem.

6. On or about April 14, 1943 said "S. S. Egg Harbor" was in the port of San Pedro, California, and was destined upon a voyage upon the high seas and on waters within the admiralty and maritime jurisdiction of the United States and of this Honorable Court, to wit, from said port of San Pedro, California, and from El Segundo, California to Point Wells, Washington. Libelant was then and there and at all times herein mentioned the owner of certain petroleum products as follows:

60,933.31 barrels of Standard diesel furnace oil,
63,789.52 barrels of Standard gasoline.

7. Libelant made and entered into with respondent United States of America, by and through said War Shipping Administration, an agreement wherein and whereby United States of America agreed for a valuable consideration to convey said 60,933.31 barrels of Standard diesel furnace oil and said 63,789.52 barrels of Standard gasoline separately and in good order and con-

dition on board said "S. S. Egg Harbor" to and unload said petroleum products at Point Wells, Washington.

8. That thereafter and on or about April 17, 1943 said [4] 60,933.31 barrels of Standard diesel furnace oil were loaded upon said "S. S. Egg Harbor" at San Pedro, California in good order and condition; that thereafter on April 18, 1943 said 63,789.52 barrels of Standard gasoline were loaded on said "S. S. Egg Harbor" at El Segundo, California in good order and condition.

9. That said vessel "S. S. Egg Harbor" thereafter proceeded on her voyage and respondents, not regarding their duty in that respect nor the promise and undertaking aforesaid, did not so convey and deliver said petroleum products in such or any good order and condition, but on the contrary said respondents negligently and without due diligence allowed and caused part of each of said petroleum products to become commingled, mixed and adulterated one with the other, and upon reaching said Point Wells, Washington 23,632.45 barrels of said Standard diesel furnace oil and 21,098.02 barrels of said Standard gasoline had become so commingled, mixed and adulterated that by reason of all of the foregoing libellant has sustained damage to the amount of Fifty Thousand Dollars (\$50,000.00).

10. That said respondent Keystone Shipping Company is and was in all things herein mentioned and at all times herein set forth the agent of War Shipping Administration and of respondent United States of America.

11. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays:

1. That process in due form of law according to the courts and practice of this Honorable Court in causes of admiralty and maritime jurisdiction issue against said United States of America and said Keystone Shipping Company, requiring each of them to appear and answer the foregoing libel;

2. That this court shall decree the payment by said respondents to libelant of the sum of Fifty Thousand Dollars (\$50,000.00), [5] together with such other sum or sums as the proof shall show libelant to be entitled to, together with interest thereon as by law provided and libelant's costs; and

3. That libelant have such other, additional and further relief as may seem to this court just and proper.

STANDARD OIL COMPANY OF CALIFORNIA,
a corporation,

By Geo. J. O'Brien

LAWLER, FELIX & HALL
MARCUS MATTSON

Proctors for Libelant. [6]

[Verified.]

[Endorsed]: Filed Mar. 7, 1944. [7]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT, UNITED STATES
OF AMERICA

Respondent, United States of America, for itself alone, answers the libel in personam and admits, denies and alleges as follows:

I.

Admits the allegations in Paragraph 1 of the libel.

II.

Admits the allegations in Paragraph 2 of the libel.

III.

Admits the allegations in Paragraph 3 of the libel.

IV.

Admits the allegations in Paragraph 4 as true at the time [8] of the filing of the libel on or about March 7, 1944.

V.

Admits the allegations in Paragraph 5 of the libel.

VI.

Admits the allegations of Paragraph 6 of the libel except that respondent is without knowledge or information sufficient to form a belief as to the truth of the averment relating to the ownership by libelant of certain petroleum products as stated and denies such allegations on that ground.

VII.

Admits that respondent by War Shipping Administration entered into an agreement with libelant for the car-

riage of certain petroleum products and alleges that said agreement is a written agreement entitled "Tanker Voyage Charter Party", dated April 14, 1943, of which, as respondent is informed and believes and therefore alleges, libelant has a copy and that the carriage of said petroleum products by respondent was to be on the S. S. "Egg Harbor" with destination Point Wells, Washington; denies all other allegations in Paragraph 7 except as expressly admitted.

VIII.

Admits that certain petroleum products of libelant in the form of diesel oil and gasoline were loaded upon the S. S. "Egg Harbor" at San Pedro, California, and El Segundo, California, on or about the times stated in the libel but denies all other allegations except as expressly admitted.

IX.

Denies each and every allegation of Paragraph 9 of the libel except that respondent admits that the S. S. "Egg Harbor" thereafter proceeded on her voyage to Point Wells, Washington, and did arrive at Point Wells, Washington; denies that libelant [9] sustained damage in the sum of \$50,000 or in any sum whatever.

X.

Admits the allegations in Paragraph 10 of the libel in so far as respondent, Keystone Shipping Company, was at all times mentioned therein an agent of respondent under a regular War Shipping Administration Agency Agreement.

XI.

Admits the allegations of Paragraph 11 of the libel.

For a First Affirmative Defense, Respondent Alleges:

I.

That the agreement referred to in the libel in personam as being entered into between libelant and respondent was a written agreement in form entitled "Tanker Voyage Charter Party", being Form No. 104 of the War Shipping Administration; that said agreement was and is dated as of April 14, 1943, and provided for the charter of the S. S. "Egg Harbor" by Standard Oil Company of California as charterer from respondent, United States of America, acting by and through the War Shipping Administration as owner, for carriage of a cargo of gasoline and/or diesel oil from San Pedro and/or El Segundo, California, to Safe U. S. Pacific Northwest; that reference is hereby made to said charter party for full particulars.

II.

That pursuant to said charter party certain gasoline and diesel oil was carried on the voyage contemplated to Point Wells, Washington.

III.

That Paragraph 19 of said charter party, Part II, reads as follows:

"19. Cleaning.—If requested by the Charterer, the Vessel will steam the tanks, pipes and pumps of the [10] Vessel or Butterworth en route to loading port and there pump water ballast and/or slops into

shore tank or barge to be supplied by Charterer immediately on arrival. Any delay in furnishing these facilities shall count as used lay time. Any further cleaning, if required, shall be done by and at the expense of Charterer and time consumed shall count as used lay time. If Charterer does not require additional cleaning at port of loading Owner shall not be responsible for any damage caused to or contamination of cargo, by reason of failure to have the tanks properly cleaned for receiving the shipment. Except as may otherwise be indicated in Part I, the Vessel shall not be responsible for leakage, shrinkage, difference between reported intake and reported outturn, deterioration, discoloration, or change in quality of the cargo, nor for any consequences arising out of shipping more than one grade of cargo."

IV.

That by reason of the premises if said petroleum products so shipped on said voyage became commingled, mixed or adulterated one with the other as alleged by libellant, it was a "consequence arising out of shipping more than one grade of cargo" within said Paragraph 19 of the charter party.

For a Second Affirmative Defense, Respondent Alleges:

I.

Incorporates Paragraphs I and II of its First Affirmative Defense herein the same as though fully set forth at length.

II.

That Paragraph 7 of said charter party, Part II, reads as follows: [11]

"7. Pumping In and Out.—The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connection, where delivery of the cargo shall be taken by the Charterer or its Consignee. The Vessel shall supply her pumps and the necessary steam for discharging in all ports where the regulations permit of fire on board, as well as necessary hands. Should regulations not permit fires on board, the Charterer or Consignee shall supply, at its expense, all steam necessary for discharging as well as loading, but the Owner shall pay for steam supplied to the Vessel for all other purposes. If cargo is loaded from lighters, the Vessel, if permitted to have fires on board, shall, if required, furnish steam to lighters at Charterer's expense for pumping cargo into the Vessel."

And Paragraph 20(a) of said charter party, Part II, reads as follows:

"20(a). Act of God, etc.—The Vessel, her Master and Owner shall not, unless otherwise in this Charter expressly provided, be responsible for any loss or damage, or delay or failure in performing hereunder, arising or resulting from:—any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; fire, unless

caused by the personal design or neglect of the Owner; collision, stranding, or peril, danger or accident of the sea or other [12] navigable waters; saving or attempting to save life or property; wastage in weight or bulk, or any other loss or damage arising from inherent defect, quality or vice of the cargo; any act or omission of the Charterer or Owner, Shipper or Consignee of the cargo, their agents or representatives; insufficiency of packing; insufficiency or inadequacy of marks; explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, equipment or machinery; unseaworthiness of the Vessel unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped and supplied; or from any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel, her Master or Owner, nor the Charter, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from:—Act of God; act of war; act of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process provided bond is promptly furnished to release the Vessel or cargo; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion.”

III.

That by reason of the premises if said petroleum products so shipped on said voyage became commingled,

mixed or adulterated one with the other as alleged by libelant, it arose "without the [13] actual fault or privity of the owner", respondent herein, in a pumping operation within Paragraphs 7 and 20(a) of said charter party.

Wherefore, respondent, United States of America, prays that libelant take nothing; that its libel in personam be dismissed; for costs and for such other and further relief as may be proper.

Dated: July 25, 1944.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

LILLICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

Proctors for Respondent, United States
of America

[Endorsed]: Filed Jul. 25, 1944. [14]

[Title of District Court and Cause.]

STIPULATION

It is stipulated by libelant and respondent, United States of America, that it may be deemed at the trial of this suit that competent and credible witnesses called by libelant have testified to the following facts:

1. That the charter party and bills of lading, photo-stats of which are annexed hereto, are the documents which were executed and issued in connection with the carriage of the cargo involved in this suit from San Pedro and El Segundo to Point Wells.

2. That libelant was the owner of the 60,933.31 bbls. of Standard diesel furnace oil taken on board the S. S. Egg Harbor at San Pedro on April 17, 1943 and of the 63,789.52 bbls. of Standard gasoline taken on board such vessel at El Segundo on [15] April 18, 1943; that said furnace oil and gasoline were each fully refined and readily marketable as such.

3. That the "customary freight unit" for the oil and gasoline involved in this suit was the barrel.

4. That the 60,933.31 bbls. of Standard diesel furnace oil loaded on the S. S. Egg Harbor at San Pedro on April 17, 1943 and the 63,789.52 bbls. of Standard gasoline loaded on such vessel at El Segundo on April 18, 1943, were received on board the vessel uncontaminated.

5. That upon the arrival of the S. S. Egg Harbor at Point Wells and immediately prior to the commencement of unloading operations on April 23, 1943 a visual in-

spection of the cargo showed no contamination of the Standard gasoline. The Standard diesel furnace oil and the Standard gasoline had theretofore been carried in separate tanks in said vessel.

6. That the portion of the cargo thus carried by said S. S. Egg Harbor to Point Wells plus the products with which it was mixed in libelant's shore tanks, all of which was subsequently found to be so contaminated as to be unmerchantable and require refinery reprocessing and which was returned to libelant's El Segundo refinery in the S. S. Egg Harbor for reprocessing was: 25,507 bbls. of said Standard diesel furnace oil, contaminated with gasoline, and 19,479 bbls. of said Standard gasoline, contaminated with standard diesel furnace oil. (No stipulation is made herein with respect to the time or times when, or place or places where, said products were ascertained to be contaminated, or with respect to the place or places where said contamination took place.)

7. That the damage incurred by libelant as a result of the contamination of said Standard diesel furnace oil and Standard gasoline is computed in the following manner: [16]

Value in merchantable condition at Los Angeles area of part of cargo which was contaminated	\$ 88,117.53
Add freight and insurance to Point Wells	13,295.02
	<hr/>
Value in merchantable condition at Point Wells of part of cargo which was contaminated	\$101,412.55

Gross value at Los Angeles area of products salvaged from con- taminated part of cargo	\$69,072.00	
Deduct handling charges at Point Wells	\$ 482.92	
Deduct freight and insurance to Los Angeles area	13,041.65	
Deduct reprocessing cost at refinery in Los Angeles area	3,293.00	
	<hr/>	
Total	16,817.57	
	<hr/>	
Net value of products salvaged		52,254.43
		<hr/>
Total damage		\$ 49,158.12

Dated: Los Angeles, California, December 6, 1944.

CHARLES H. CARR

LILLICK, GEARY, McHOSE & ADAMS

By A. F. Mack, Jr.

Proctors for Respondent, United States
of America

LAWLER, FELIX & HALL

JOHN M. HALL

MARCUS MATTSON

By John M. Hall

Proctors for Libelant [17]

TANKER VOYAGE CHARTER PARTY

PART I

CHARTER PARTY made as of **April 14**, 194**3**, at **Philadelphia, Pa.**

between the UNITED STATES OF AMERICA, acting by and through the WAR SHIPPING ADMINISTRATION (hereinafter called the "Owner") of the good **American** **35** "FOG HARBOR"
(hereinafter called the "Vessel") and **STANDARD OIL COMPANY OF CALIFORNIA**

(hereinafter called the "Charterer")
This Charter Party consists of this Part I and Part II on the reverse hereof. Unless in this Part I otherwise provided, all of the provisions of Part II shall be part of this Charter Party as though fully incorporated herein.

Net Registered Tonnage of Vessel **6,128** **Classed** **AI** **American Bureau of Shipping**

Loaded Draft of Vessel Applicable for this Voyage: **30** ft **0 1/2** in. in salt water

Capacity of **138,000** bbls (of 42 American measured gallons at 60° F each) or **Diesel Oil**
terms of 1200 lbs. of **Gasoline or**
(10% more or less, vessel's option)

Now **Chartered** in all main tanks

Loading Port **San Pedro and/or El Segundo, California**

Cargo **Gasoline and/or Diesel Oil**

Discharging Port **safe U. S. Pacific Northwest**

Freight Rate **U. S. A. Rate applicable** Payable at **Philadelphia, Pa.**

Readiness Date **April 12, 1943** Cancelling Date **May 12, 1943**

Hours for Loading & Discharging **96** Demurrage per hour **\$125.00** Lay 2 cargoes

SPECIAL PROVISIONS

1. This Charter Party cancels and supercedes Charter Party dated April 5, 1943, Contract No. 268.

IN WITNESS WHEREOF the parties herein have executed this agreement in triplicate as of the day and year first above written

Witness the signature of **Walter E. Rex**

UNITED STATES OF AMERICA
By WAR SHIPPING ADMINISTRATION
By KEYSTONE SHIPPING CO. Agent

By **Walter E. Rex, Secretary**

STANDARD OIL COMPANY OF CALIFORNIA

PART I

1997年11月1日

1. He is a very good student. He is very smart.
 2. He is a very good student. He is very smart.

Shipped in apparent good order and condition by Standard Oil Co. of Ind.

on board the American Steamship Metropole "EG" 1941

whereof L. S. Olson is master, at the Port of Los Angeles, California

[illegible]

.....

.....

to be delivered at the Port of _____, or so near thereto as the

vessel can safely get, always afloat, unto.....

pursuant to terms of contract/charter, dated.....

It is deemed to be in the public interest that the disclosure of the contents of this document is not to be made to any unauthorized person. It is the policy of the Department of Defense to protect the security of the United States by preventing the unauthorized disclosure of information which is classified as secret or confidential. The unauthorized disclosure of such information is prohibited by law.

In witness whereof the master has signed..... bills of lading of

this tenor and date, one of which being accomplished, the others will be void.

Deed of Sunday this 1913 day of Aug 1913

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, Approved April 18, 1924, which shall be deemed to be incorporated herein, as existing in 1934, when such bill of lading is issued, and the Contract of Carriage contained in the bill of lading shall be subject to its conditions and liabilities under the said Act. If any term of this bill of lading be repugnant to said Act in any extent, such term shall be void to that extent, but no further.

F. R. L. Sen
MASTER.

Bill of Lading No.

Shipped in apparent good order and condition by **Standard Oil Co. of California**on board the **American**STEAMSHIP
MOTORSHIP" **HUG HARBOR** "whereof **L. C. Olsen**is master, at the Port of **El Segundo, California**

Part Cargo Standard Gasoline (Summer Grade) in Bulk:

61,792.52

Gross 42 Gallon Barrels at 60° F.

7,353.34

Long Tons

60.1

A.P.I. Gravity

to be delivered at the Port of

.. or so near thereto as the

vessel can safely get, always afloat, unto

pursuant to terms of contract / charter, dated **as agreed**in witness whereof the master has signed **Omn (1)**

bills of lading of

this tenor and date, one of which being accomplished, the others will be void.

Dated at **El Segundo, California**

this

18 th.

day of

April, 1943,**L. C. Olsen**
MASTER

[Title of District Court and Cause.]

ORDER FOR DISCONTINUANCE AGAINST
RESPONDENT, KEYSTONE SHIPPING
COMPANY

It appearing that respondent, Keystone Shipping Company, a corporation, has never been served with process or appeared herein, and that respondent, Keystone Shipping Company, is neither an indispensable nor a necessary party to this suit; and good cause appearing therefor;

It Is Ordered that this suit shall be deemed to have been discontinued as against respondent, Keystone Shipping Company, a corporation, without prejudice to the continued prosecution of this suit by libellant against respondent, United States of America, and without costs against libellant.

Dated: Jan. 30, 1945.

BEN HARRISON
Judge of the United States District Court.

Judgment Entered Jan. 30, 1945. Docketed Jan. 30, 1945. Book 30, page 547. Edmund L. Smith, Clerk; by Murray E. Wire, Deputy.

[Endorsed]: Filed Jan. 30, 1945. [22]

[Title of District Court and Cause.]

AMENDMENT TO LIBEL IN PERSONAM, AND
ORDER PERMITTING THE FILING THERE-
OF

By leave of the Court, libelant amends its libel in personam on file herein, by eliminating paragraph 9 of said libel and substituting in place thereof the following paragraph:

"9. That said vessel S. S. "Egg Harbor" thereafter proceeded on her voyage and respondents, not regarding their duty in that respect nor the promise and undertaking aforesaid, did not so convey and deliver said petroleum products in such or any good order and condition, but on the contrary failed to exercise due diligence to make said vessel seaworthy or properly man or equip or supply said vessel or make the parts of said vessel in which [23] cargo was carried fit or safe for the reception of the same or its carriage or preservation, and failed to properly or carefully load, handle, stow, carry, care for or discharge said cargo, as a result whereof a part of the oil and gasoline comprising said cargo, to-wit, approximately 23,131 bbls. of said Standard diesel furnace oil and approximately 8,140 bbls. of said Standard gasoline, became commingled and mixed so that when the same were delivered to libelant at said Point Wells, Washington, the following occurred: a quantity of said Standard diesel furnace oil so commingled and contaminated with gasoline

as to be unmerchantable and require refinery reprocessing was delivered to libelant, and libelant, not knowing of said contamination, took delivery of the same in a tank which already contained approximately 2,376 bbls. of uncontaminated Standard diesel furnace oil, whereby the contents of said tank became contaminated, and a quantity of said Standard gasoline so commingled and contaminated with diesel furnace oil as to be unmerchantable and require refinery reprocessing was delivered to libelant, and libelant, not knowing of said contamination, took delivery of the same in a tank which already contained approximately 11,339 bbls. of uncontaminated Standard gasoline, whereby the contents of said tank became contaminated; that from the circumstances attending the delivery of said cargo respondent might reasonably have understood or inferred that said cargo would be received by libelant from said vessel into shore tanks already partly full; that by reason of the contamination of said cargo and the contamination of the products already in said [24] tanks when the contaminated cargo was added thereto libelant has been damaged in the sum of \$50,000.00."

LAWLER, FELIX & HALL
JOHN M. HALL
MARCUS MATTSON

By John M. Hall

Proctors for Libelant [25]

It Is Stipulated, that the libel herein shall be deemed to have been amended by libelant as hereinbefore stated, and that respondent, United States of America, shall, without the filing of any additional pleadings be deemed to have denied each and every allegation of said paragraph 9 as amended, except that the S. S. "Egg Harbor" thereafter proceeded on her voyage to Point Wells, Washington, and did arrive at Point Wells.

LAWLER, FELIX & HALL

JOHN M. HALL

MARCUS MATTSON

By John M. Hall

Proctors for Libelant

CHARLES H. CARR

LILLICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

By A. F. Mack, Jr.

Proctors for Respondent, United States
of America

It is so ordered.

Dated, January, 1945.

.....
Judge of the United States District Court

[Endorsed]: Filed Jan. 30, 1945. [26]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER PERMIT-
TING LIBELANT TO AMEND LIBEL TO
CONFORM TO THE PROOF

To Respondent, United States of America and to Hon.
Charles H. Carr, United States Attorney, Robert
E. Wright, Assistant United States Attorney, A. F.
Mack, Jr., and Lillick, Geary, McHose & Adams,
Proctors for Said Respondent

Please take notice that libelant will bring the fol-
lowing motion on for hearing before the Honorable Ben
Harrison, Judge of the District Court, in the courtroom
of said Judge in the United States Post Office and Court
House Building, 312 North Spring Street, Los Angeles,
California, on the 1st day of March, 1945, at 9:30 o'clock
in the forenoon on that date, or soon thereafter as [27]
proctor for libelant may be heard.

Said motion will be based on the pleadings and the
evidence in this cause.

Motion for an Order Permitting Libelant to
Amend Libel to Conform to the Proof.

Pursuant to Admiralty Rule 23 of the Supreme Court
of the United States libelant moves this Honorable Court
for an order permitting libelant to amend its libel here-
in in the following particulars:

By adding before the prayer of said libel a new para-
graph reading as follows:

"12. The agreement made and entered into by
and between libelant and respondent, United States
of America, by and through War Shipping Admin-
istration, as aforesaid, provided that damages for a

breach thereof should include all provable damages, and all costs of suit, and attorney fees incurred in any action thereunder. In the prosecution of this suit it has been and will be necessary for libelant to procure the services of attorneys and on that account to incur attorney fees."

By adding to the prayer of said libel a new paragraph reading as follows:

"4. That libelant have and recover from respondents the amount of its attorney fees incurred herein."

LAWLER, FELIX & HALL

JOHN M. HALL

MARCUS MATTSON

By John M. Hall

Proctors for Libelant

Authority for this Motion:

Benedict on Admiralty, 6th ed., Vol. 2, sec. 355 [28]

The undersigned consent that the following motion may be heard at the time and place stated in the foregoing notice.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARY, McHOSE & ADAMS, and
A. F. MACK, JR.

By A. F. Mack, Jr.

Proctors for Respondent, United States
of America.

[Endorsed]: Filed Feb. 26, 1945. [29]

[Title of District Court and Cause.]

OPINION

Appearances:

Lawler, Felix & Hall, Esqs. and Marcus Mattson, Esq.,
800 Standard Oil Building, Los Angeles, California,
Proctors for Libelant,

Charles H. Carr, Esq., United States Attorney, U. S.
Post Office & Court House, Los Angeles, California, and
Lillick, Geary, McHose & Adams, Esqs. and Augustus F.
Mack, Jr., Esq., 634 South Spring Street, Los Angeles,
California, Proctors for the Respondents.

This is a proceeding in admiralty wherein libelant seeks damages under the Suits in Admiralty Act (46 USCA 741-752) for the comingling of part of a cargo of gasoline and diesel oil shipped on the tanker "Egg Harbor", a vessel owned and operated by the United States of America, by and through the War Shipping Administration.

This case presents two broad questions of law, namely:

1. Does the Carriage of Goods by Sea Act apply to the shipment involved? [30]
2. Did the War Shipping Administration exceed its power in executing a charter party wherein it created a liability against the United States for all provable damages including attorney's fees?

According to the evidence the "Egg Harbor", a Swan Island tanker, on its maiden voyage to Point Wells, Washington, received from the libelant at San Pedro, California, 60,933.31 barrels of marketable Standard diesel furnace oil, and at El Segundo, California, 63,789.52 barrels of marketable Standard gasoline. Upon arrival at Point

Wells, Washington, tests were taken by means of lowering small containers into the tanks and observing and smelling the contents, failed to disclose any contamination. The libelant also took samples at the dock end of the hose when the pumping of both products began and at spaced intervals thereafter. By this means, it was discovered about three hours after pumping commenced, that contaminated gasoline was being discharged. The pumps were immediately shut down but later pumping was resumed, and the contamination continued. Thereafter, the diesel oil was unloaded separately without contamination. After the diesel oil was unloaded, the remainder of the gasoline was removed free from contamination. Later, on the following day, it was discovered through laboratory tests that part of the diesel oil had been contaminated with gasoline. As a result of this co-mingling 8,140 barrels of Standard gasoline and 23,131 barrels of diesel oil were so contaminated by the admixture as to require reprocessing. And in addition thereto, 11,339 barrels of Standard gasoline and 2,376 barrels of Standard diesel oil already in the shore tanks into which the contaminated products were pumped became so contaminated by this admixture as to also require reprocessing.

All the above oil products had to be reprocessed at the libelant's plant in El Segundo, California, as they had no market value in their contaminated condition at Point Wells, Washington. If libelant [31] is entitled to recover damages for all the oil contaminated it would be entitled to recover the sum of \$49,158.12. On the other hand, if it is entitled to recover only for that portion of the cargo damaged, it would be entitled to the sum of \$32,914.56.

The first question to be determined is whether the Carriage of Goods by Sea Act covers the shipment of oil involved. The libelant contends that it does, while the re-

spondent holds to the contrary, because the vessel was operating under a charter for the full capacity of the vessel and therefore respondent was free to contract as a private party. Under this reasoning the parties were in the relationship of a bailor and bailee. Respondent then refers to paragraph 19 of the charter party which provides:

“Except as may otherwise be indicated in Part I, the vessel shall not be responsible for . . . any consequences arising out of shipping more than one grade of cargo.”

It naturally follows that if the Carriage of Goods by Sea Act does not apply, the libel must be dismissed because of the above provision. But it appears clear to me that said act (46 USCA §1300 et. seq.) clearly applies and the rights and liabilities of the parties are controlled thereby. Paragraph 25 of the charter party is entitled “Clause Paramount” and reads as follows:

“All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated therein, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further.”

The Carriage of Goods by Sea Act is made applicable to the carriage of goods between ports of the United States if the “bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports” contains “an express statement

that it shall be subject to the provisions of this [32] Chapter and Section 25 of Title 49." Reading paragraph 25 of the charter party in connection with this language in the Carriage of Goods by Sea Act leads to the inescapable conclusion that there was a sufficient incorporation of the Act to make it a part of the contract of carriage.

Respondent relies strongly on the *G. R. Crowe* 294 F. 506. In that case action was brought to recover for loss of gas and oil caused by leakage. The cargo was shipped under a charter party for the full capacity of the vessel. The court held that the agreement between the parties for the full capacity of the vessel amounted to a contract for private carriage and therefore the Harter Act, a predecessor to the Carriage of Goods by Sea Act, did not apply. This view has been substantiated by numerous other decisions both prior and subsequent to the *Crowe* case. *Hine et al. v. New York & Bermudez Co.*, 68 F. 920; *The Fri*, 154 F. 333; *Lake Steam Shipping Co. v. Bacon*, 129 F. 819; *The Royal Sceptre*, 187 F. 224; *The Rokeby*, 202 F. 322; *The Elizabeth Edwards*, 27 F. (2d) 747. While a common element exists between these cases and the one at bar in that the parties have contracted for the full capacity of the vessel and have thereby placed the respondent in the position of a private carrier, there also exist fundamental differences. In the instant case there was an express incorporation of the Carriage of Goods by Sea Act into the charter party,—an element entirely lacking in the cases cited by the respondent. Furthermore, under the Carriage of Goods by Sea Act, which is controlling in this case, there is a provision giving effect to its incorporation in the charter party. This provision is not found in the Harter Act under which the *Crowe* and like cases were decided.

Even under the Harter Act cases have recognized that it may be incorporated into contracts where it would not otherwise govern by its own force. In *Framlington Court*, 69 F. (2d) 300, it was stated:

“Having incorporated the Harter Act by reference in the charter, the parties are bound to take it with its burdens as well as its benefits and it is controlling.” [33]

In *Warner Sugar Refining Co. v. Munson S. S. Line*, 23 F. (2d) 194, the court said:

“The charter party now under consideration gave the charterer the full capacity of the ship *Munamar*, and as such it was not a common carrier, and the Harter Act . . . would not of its own force have applied but the contracting parties have expressly made it a part of their contract, which they were at liberty to do.”

See also *The Vermont*, 47 Fed. Supp. 877; *The Agwimoon*, 24 F. (2d) 864. It is therefore apparent that the parties could do exactly what they did do, namely: make the Carriage of Goods by Sea Act a part of their charter notwithstanding the fact that the respondent was contracting as a private carrier. It would appear therefore that paragraph 19, in so far as it attempts to relieve respondent from its own responsibilities, is in conflict with the terms of the Carriage of Goods by Sea Act and is inapplicable. (46 USCA §1303 (8)).

Having determined that the Carriage of Goods by Sea Act applies, the responsibility of the respondent under the Act must then be determined.

Title 46 USCA §1303 provides as follows:

- (1). The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—
 - (a) Make the ship seaworthy;
 - (b) Properly man, equip, and supply the ship;
 - (c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.
- (2). The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

And §1304 of Title 46 USCA places the burden of proving the exercise of due diligence upon the carrier whenever the loss has resulted from unseaworthiness.

At the outset it should be noted that in undertaking to transport oil the respondent charged itself with a high degree of care. As stated in *The Turret Crown*, 297 F. 766: [34]

“Oil is much more difficult to contain than water. Small leaks in a water tank tend to correct themselves by the formation of rust; whereas oil not only does not cause rust, but tends to dissolve rust”

The Arakan, 11 F. (2d) 791; *American Linseed Co. v. U. S.*, 40 F. (2d) 657.

This statement becomes more important when considered in the light of the testimony of two expert witnesses as to the necessity of using spectacle flanges in blocking off one tank in the vessel from another. A spectacle flange consists of two metal fittings connected by bolts and sepa-

rated by a flat, round piece of sheet metal. When installed in a length of pipe this metal flange acts as a dam by blocking off the flow of liquid. While the vessel was equipped with some spectacle flanges, those were not closed. The vessel was laid out in nine separate tanks. Each of these tanks was connected by a series of pipes running between them. The cargo in this case was distributed as follows: The Standard gasoline was put in tanks 2, 3, 4 and 9, and the diesel oil was put in tanks 5, 6, 7 and 8. On the pipes connecting these tanks were "double cross-over valves", which were operated from the deck of the vessel by means of a wheel attached to a rod extending down to the valves. These valves were the only means of preventing the cargo of one tank from becoming mixed with another. According to the testimony of the chief pumper, he personally set these valves so that the "tell tale" indicated they were closed, and he also chained and sealed them. The chief pumper revealed that certain pressure tests were made of the pipes, connections and valves on the trip down from the fitting docks to San Pedro. Taking these statements as true, there was still no way of being certain that the valves would block off the two cargoes. Rust, nails, or any type of foreign matter could have prevented the valves from setting properly. Furthermore, it was necessary to rely on the valves remaining untouched by the members of the crew if we assume they were properly closed when the products were loaded. On the other hand, the use of spectacle flanges would have guaranteed the separate shipment of the cargo and removed the element of risk. Accordingly, in the light of the precarious [35] nature of the cargo, the fact that it was the ship's maiden voyage, the uncertainty of the proper setting of hand valves, and the inevitable reliance on the good judgment of the crew not to alter the

valves, it is my opinion, that in not using spectacle flanges which could have been installed expeditiously and inexpensively, and not closing those that were installed, the respondent was guilty of a failure to exercise due diligence to make the ship seaworthy for the carriage of oil and gasoline.

Mr. Justice Gray in *The Sylvia*, 171 U. S. 462, 19 S. Ct. 7, 43 L. Ed. 241, stated:

“The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.”

And again in *The Bill*, 47 F. Supp. 969, we find the following:

“The ship owner and the crew must . . . be held to familiarity with the particular construction and design of the ship and its apparatus, and with the characteristics and effect of particular cargoes which the vessel carried.”

The respondent at no time made any explanation accounting for the contamination. Its representatives inspected the vessel shortly after the contamination was discovered and had full opportunity to ascertain the cause thereof but would admit nothing, except that “the cross-over valves” on tank 5 were found partially open. It is significant that forthwith one of the mates was relieved from duty but no explanation for such action was given.

Even if the failure to use spectacle flanges instead of “double cross-over” valves might not be deemed as lack of due diligence in making the vessel seaworthy, the respondent under said Section 1303 (2) of Title 46 USCA had the responsibility of properly and carefully discharging the cargo and this it did not do. Having received the diesel

oil and gasoline in marketable condition, the failure to deliver it in like condition would indicate that it had not been discharged properly and carefully in the absence of any explanation to the contrary. The Joseph Hock, 70 F. (2d) 259-260.

In order to recover for the loss resulting from the [36] reprocessing of this oil and gasoline the libellant must bring itself within the rule governing special damages in contract cases as expressed in 9 Am. Jur.—Carriers—Section 789, p. 909, as follows:

“Under certain circumstances, damages may be recovered as within the contemplation of the parties, although they are in excess of those which would ordinarily be considered the natural and probable consequence of the default of the carrier. Special damages may be recovered for the damages arising out of special circumstances known to the parties. In all such cases, the carrier must have had notice of the special circumstances which give rise to the damages.

. . . It is not always necessary, however, that the special facts actually within the contemplation of the parties should be mentioned in the negotiations, or in express terms made a part of the contract. Whenever they are known to the carrier, under such circumstances, or they are of such a character that the parties may be fairly supposed to have them in contemplation in making the contract, such special facts become relevant in determining the question of damages. It is not essential that the intended use and application of the goods to be carried should, in all cases, be expressly brought to the carrier's notice at the time they are received, but the carrier may be liable whenever such special use could be reasonably inferred from the known circumstances.”

A similar statement of the law will be found in *Simons-Mayrant Co. v. Atlantic Coast Line R. Co.*, 207 Fed. 387.

Under this rule, in the absence of anything in the charter party to the contrary, it would only be necessary to find that at the time the respondent undertook to transport the oil and gasoline it could be reasonably inferred from the known circumstances that contaminated products from the vessel might and would likely be pumped into tanks already containing uncontaminated products. In the light of the nature of the product, the methods used in discharging it, and the experience of the parties concerning the unloading and storage of petroleum products it might be reasonably assumed that this disposition of the cargo was within the contemplation of the carrier.

But the respondent points to paragraph 7 of the charter party which reads in part: [37]

“The cargo shall be pumped . 1 . out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel’s permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee.”

The respondent claims that this relieves the carrier from liability after the cargo left the permanent hose connections. That would be true if the act causing the damage occurred after the cargo had left the permanent hose connections. But here the damage to the cargo occurred on board the vessel,—a place where under paragraph 7 and the Carriage of Goods by Sea Act, the carrier was still responsible for the care of the cargo. The fact that the damage did not result until the cargo had passed the permanent hose connections could in no way relieve the carrier from the original breach. The charter party is one instrument and should be read as a whole (*Emmons Coal*

Mining Corp. v. Sir R. Ropner & Co., 31 F. (2d) 948; Nicholson Transit Co. v. Nicholson Universal S. S. Co., 60 F. (2d) 90; The Framlington Court, 69 F. (2d) 300) and therefore paragraph 7 should be read in connection with paragraph 34 which states:

“Damages for breach of this Charter shall include all provable damages, . . .”.

Thus, the damage to the oil in the storage tank being provable as a breach of the undertaking of the carrier, paragraph 7 should not be so construed as to limit recovery as provided in said paragraph 34.

The charter party under consideration was prepared by the War Shipping Administration for the carriage of Petroleum and/or its products in bulk on vessels. It is on a printed form headed “Form No. 104—Warshipoilvoy 6/1/42”. Use of this form was required by an order of the War Shipping Administration published in 46 Code of Federal Regulations §303.2. This being the case the charter party must be strictly construed against the respondent. The Helen Barnet Gring, 48 F. (2d) 629; The Pensacola, 263 Fed. 661; Compania de Navigacion La Flecha v. Brauer et al., 168 U. S. 104, 18 S. Ct. 12, 42 L. Ed. 398.

There seems to be no serious question that attorney's fees [38] may be recovered as part of the damages if so stipulated in the contract. 25 C. J. S. p. 531-3; U. S. Fidelity and Guaranty Co. v. Highway Eng. C. Co., 51 F. (2d) 894; Ghirardelli v. Peninsula Properties Co., 16 Cal. (2d) 494, 107 P. (2d) 41.

Having determined that the charter party creates a liability upon respondent for all damages including attorney's fees as a part thereof, in the event the parties thereto were private contractors, it must now be decided whether

the War Shipping Administration had the authority to bind the United States under said charter party.

In approaching this problem it must be borne in mind that if Congress has not under proper legislation waived immunity from suit, such cannot be accomplished by an administrative agent. (*Munro v. U. S.*, 303 U. S. 36, 58 S. Ct. 421, 82 L. Ed. 633; *U. S. v. Shaw*, 309 U. S. 495, 60 S. Ct. 659, 84 L. Ed. 888; *Stanley v. Schwalbey*, 162 U. S. 255, 16 S. Ct. 754, 40 L. Ed. 960; *Jones v. Tower Production Co.*, 120 F. (2d) 779). While this is true, in none of these cases did Congress go so far in waiving sovereign immunity as it did in the Suits in Admiralty Act and the Merchant Marine Act.

Recently the Supreme Court has expressed the view that when the Government enters the field of commercial activities a liberal approach will be taken to the question of immunity from suit. (*F. H. R. v. Burr*, 309 U. S. 242, 60 S. Ct. 472, 84 L. Ed. 716; *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784; *Reconstruction Finance Corp. v. Menihan*, 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595). In *Brady v. Roosevelt S. S. Co.*, 317 U. S. 575, 63 S. Ct. 425, 87 L. Ed. 471, it was stated:

"For when it comes to the utilization of corporate facilities in the broadening phases of federal activities in the commercial or business field, immunity from suit is not favored. . . . Congress adopted that policy when it made corporations wholly owned by the United States suable on maritime causes of action under Sec. 2 of the Suits in Admiralty Act."

Section 207 of the Merchant Marine Act of 1936 (46 USCA 1117) later transferred to the War Shipping Administration under [39] Executive Order No. 9054,

February 8, 1942, (7 Fed. Reg. 837) provides in part as follows :

“The Commission may enter into such contracts, upon behalf of the United States, . . . as may, in its discretion, be necessary to carry on the activities authorized by this chapter, . . . in the same manner that a private corporation may contract within the scope of the authority conferred by its charter.”

While my attention has not been called to any decision interpreting this provision of the law, it appears to me that the language thereof is clear and explicit and if it means what it appears to say, the War Shipping Administration has the same authority as any private corporation to enter into contracts and if it has that authority, it has the power to bind the United States by the terms of said contract. This would appear to be in conformity with the purpose of the act as set forth in Section 1101 of Title 46 USCA and its predecessors the U. S. Shipping Board Merchant Fleet Corporation.

In an opinion of the Attorney General of the United States dated March 23, 1943, among other things he stated :

“In view of my conclusion that the restrictive provisions here involved were not intended to apply to the situations described above, it is unnecessary for me to consider the effect, in this connection, of Section 207 of the act of June 29, 1936 (49 Stat. 1985, as amended) and of Executive Orders No. 9054 (7 Fed. Reg. 837) and No. 9244 (*ibid.*, 7327), which authorize the War Shipping Administration to enter into contracts “in the same manner that a private corporation may contract within the scope of the authority conferred by its charter.” I may note, how-

ever, that section 207 . . . has been construed to authorize departures from the usual rules governing the making of Government contracts when the unusual or business character of the activities involved so require (Comptroller General's Decisions, A-51647, March 27, 1941, and B-15611, January 12, 1942)."

In House Report No. 2168, 75th Congress, 3rd Session, referred to in the opinion of the Attorney General, I find the following language:

"Under the act, the Maritime Commission [40] has all the general and implied powers of a business corporation."

See also Benedict on Admiralty, Vol. I, 6th Ed. page 452.

It appears that when the War Shipping Administration drew up the form which constitutes the charter party herein in question (46 Code of Fed. Reg. 303.2), it was exercising the power conferred upon it by Congress. It was certainly the intent of Congress to permit the War Shipping Administration to freely enter into charter parties and in entering into such agreements knew that the ordinary and usual responsibilities and liabilities must be assumed by it. It knew that the government was entering a field wherein it would be in competition with private carriers and in order to compete it would have to assume the same liabilities as private carriers.

Furthermore, when Congress under the provision of said Sections 741-752 of Title 46 USCA waived the sovereign immunity of the United States and permitted suits to be brought against the government to the same extent as

such suits could be maintained against private parties, it expressly subjected the government to liability for all damages resulting from the operation of government owned vessels. In said sections it has in no way limited its liability and it would appear that under such circumstances all elements of damages could be recovered. When attorney's fees are made by agreement an element of damages, I see no logical reason why the United States should not be liable therefor to the same extent as a private party. It has assumed the liability of an ordinary carrier and should not be permitted to evade it.

I therefore hold that the United States of America having lawfully assumed the responsibilities fixed by said paragraph 34 of the charter party, it became liable for damages as therein provided. I hereby find that the sum of \$8,000.00 is a reasonable amount to be allowed to said libelant as attorney's fees to be added to the sum of \$49,158.12, the amount allowed for the contamination of all the libelant's [41] oil products. Libelant is also allowed interest on said sum of \$49,158.12, at the rate of 4% per annum from April 23, 1943, together with costs herein incurred.

Libelant is directed to promptly prepare findings and decree in accordance with this opinion.

Dated: This 17 day of February, 1945.

BEN HARRISON
Judge

[Endorsed]: Filed Feb. 17, 1945. [42]

[Title of District Court and Cause.]

AMENDMENT TO LIBEL IN PERSONAM, AND
ORDER PERMITTING SUCH AMENDMENT.

By leave of the Court, libelant amends its libel in personam on file herein to conform to the proof as follows:

By adding before the prayer of said libel a new paragraph reading as follows:

“12. The agreement made and entered into by and between libelant and respondent, United States of America, by and through War Shipping Administration, as aforesaid, provided that damages for a breach thereof should include all provable damages, and all costs of suit, and attorney fees incurred in any action thereunder. [43] In the prosecution of this suit it has been and will be necessary for libelant to procure the services of attorneys and on that account to incur attorney fees.”

By adding to the prayer of said libel a new paragraph reading as follows:

“4. That libelant have and recover from respondents the amount of its attorney fees incurred herein.”

LAWLER, FELIX & HALL,

JOHN M. HALL,

MARCUS MATTSON,

By JOHN M. HALL

Proctors for Libelant

It is ordered that the libel in personam herein be amended in accordance with the foregoing.

Dated, March 5, 1945.

BEN HARRISON

Judge

[Endorsed]: Filed Mar. 5, 1945. [44]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial and was tried on the merits commencing on January 30, 1945 before the Honorable Ben Harrison, a Judge of the above entitled Court, at his courtroom in the Federal Post Office and Courthouse Building in the City of Los Angeles, California. Messrs. John M. Hall, Marcus Mattson and Wallace L. Kaapcke appeared as proctors for libelant, and Mr. A. F. Mack, Jr., and Assistant United States Attorney Robert E. Wright appeared as proctors for respondent, United States of America, which had theretofore appeared herein by filing an answer to the libel.

It appearing that respondent, Keystone Shipping Company, [45] a corporation, had never been served with process or appeared herein, and that said respondent was neither an indispensable nor a necessary party to this suit, and good cause appearing therefor, it was ordered by the Court, without objection on the part of respondent, United States of America, that this suit be deemed to have been discontinued as against respondent, Keystone Shipping Company, a corporation, without prejudice to the continued prosecution of this suit by libelant against respondent, United States of America.

Pursuant to stipulation of the parties, it was also ordered that paragraph 9 of the libel should be deemed amended in accordance with an amendment filed, and that respondent, United States of America, without the filing of any additional pleading should be deemed to have denied each and every allegation of said paragraph 9 as amended, except the allegation that the S. S. "Egg Harbor" pro-

ceeded on her voyage to Point Wells, Washington, and arrived at Point Wells.

Having heard the proofs of the respective parties and considered the same and the records, papers and stipulations in the cause and all exhibits as well as the deposition of Lawrence C. Olsen, which was offered and received in evidence without objection, and the cause having been submitted for consideration and decision, and briefs having been filed, the Court, after deliberation, having heretofore made and rendered its opinion and having, upon motion of libelant, ordered that the libel be further amended to conform to the proof by adding a new paragraph, numbered 12, before the prayer, and a new paragraph, numbered 4, to the prayer, makes the following findings of fact and states the following as its conclusions of law thereon: [46]

Findings of Fact

The Court makes the following findings of fact:

1. Libelant, Standard Oil Company of California, is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to transact business in California. Respondent, Keystone Shipping Company, is and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of one of the states of the United States, and at all of said times and in all things herein mentioned was the agent of War Shipping Administration and of respondent, United States of America.

2. The vessel S. S. "Egg Harbor" is and at all times herein mentioned was employed as a merchant vessel, and is and was owned and operated by United States of America, hereinafter referred to as "respondent", by and

through War Shipping Administration, a department and agency of United States of America. Said vessel, at the time of the filing of the libel herein, was at the port of San Pedro, California, within this District.

3. The libel herein was filed under the provisions of the Suits in Admiralty Act (46 U. S. C. A., secs. 741-752 incl.). Libelant has elected, in accordance therewith, to have this suit proceed in accordance with the principles of a libel in rem.

4. On or about April 14, 1943, said S. S. "Egg Harbor", being at the port of San Pedro, California, was destined upon a voyage upon the high seas and on waters within the admiralty and maritime jurisdiction of the United States and of this Court, to wit, from said port of San Pedro, California, and from El Segundo, California, to Point Wells, Washington. Libelant was then and there and at all times herein mentioned the owner of certain petroleum products, viz., 60,933.31 barrels of Standard diesel furnace oil [47] and 63,789.52 barrels of Standard gasoline.

5. Under date of April 14, 1943, libelant made and entered into with respondent by and through said War Shipping Administration, an agreement known and designated as a "Tanker Voyage Charter Party", hereinafter referred to as the "charter". A true copy of said charter is annexed to the stipulation on file herein which is dated December 6, 1944, and said charter was and is in the form known as "Warshipoilvoy" prescribed by order of the War Shipping Administration dated June 5, 1942 (7 Federal Register 4386 et seq.).

6. Pursuant to said charter, on April 17, 1943, said 60,933.31 barrels of Standard diesel furnace oil were loaded on said S. S. "Egg Harbor" at San Pedro in an uncontaminated condition, and on April 18, 1943 said 63,-

789.52 barrels of Standard gasoline were loaded on said S. S. "Egg Harbor" at El Segundo in an uncontaminated condition. When taken on board said vessel said diesel furnace oil and gasoline were each fully refined and readily marketable as such. At all times herein mentioned the customary freight unit for said diesel furnace oil and gasoline was the barrel. At the time said diesel furnace oil and said gasoline were taken on board said vessel bills of lading were issued therefor. A true copy of the bill of lading issued for said diesel furnace oil, which is dated April 17, 1943, and a true copy of the bill of lading which was issued for said gasoline, which is dated April 18, 1943, are annexed to the stipulation on file herein which is dated December 6, 1944. Respondent, for valuable consideration, by said charter and bills of lading agreed that said vessel would proceed with said cargo to Point Wells, Washington, and there deliver said cargo to libelant.

7. Said vessel thereafter proceeded on her voyage [48] with said cargo and arrived at Point Wells, Washington, on or about April 23, 1943. On or about April 23, 24 and 25, 1943 said cargo was discharged from said vessel into libelant's shore storage tanks.

8. Before and at the beginning of said voyage, and also during said voyage, respondent failed to exercise due diligence to make said vessel seaworthy, or properly man or equip or supply said vessel or make the parts of said vessel in which cargo was carried fit or safe for the reception of the same or its carriage or preservation, and failed to properly or carefully handle, carry, keep, care for or discharge said cargo all as required of respondent by said charter and bills of lading, and negligently and improperly handled, carried, cared for and discharged said cargo. As a direct and proximate result of the foregoing, and each thereof, and not as a consequence arising out of

shipping more than one grade of cargo, the following occurred: A part of the diesel furnace oils and gasoline comprising said cargo, to-wit, 23,131 barrels of said Standard diesel furnace oil and 8,140 barrels of said Standard gasoline became commingled and mixed while on board said vessel so that when the same were delivered to libelant at Point Wells, Washington, the same were so contaminated as to be unmerchantable and require refinery reprocessing, and a quantity of said Standard diesel furnace oil thus contaminated with gasoline was delivered to libelant, and libelant, not knowing of said contamination, took delivery of the same in a shore tank which already contained approximately 2,376 barrels of uncontaminated Standard diesel furnace oil, whereby the contents of said shore tank became contaminated, and a quantity of said Standard gasoline thus contaminated with diesel furnace oil was delivered to libelant, and libelant, not knowing of said contamination, took delivery of the same in a shore tank which already contained approximately 11,339 barrels of uncontaminated [49] Standard gasoline, whereby the contents of said shore tank became contaminated. From the circumstances which would and did attend the delivery of said cargo respondent at the time said charter was made should reasonably have understood or inferred and should have contemplated that said cargo would be received by libelant from said vessel into shore storage tanks already partly full. The value in merchantable condition at Point Wells of all of the diesel furnace oil and gasoline which became contaminated was \$101,412.55. As thus contaminated these products had no market value at Point Wells, or elsewhere. In order to salvage the same and recover marketable substances therefrom it was necessary for libelant to return and libelant did return the same to libelant's refinery for reprocessing. The value of

the substances salvaged from said contaminated products by such reprocessing at libelant's refinery was \$52,254.43, after deduction of handling, transportation, insurance and reprocessing costs. The value in merchantable condition at Point Wells of the diesel furnace oil and gasoline thus contaminated which were a part of the cargo (exclusive of said products contaminated in said shore tanks) was \$64,-168.20, and the value of the substances salvaged from the latter was \$31,253.64, after deduction of handling, transportation, insurance and reprocessing costs. All quantities of said diesel furnace oil and gasoline herein referred to were and are herein computed at a temperature of 60° Fahrenheit, which was and is the temperature commonly adopted for the measurement of these petroleum products in commercial and industrial transactions.

9. As a direct and proximate result of said commingling and mixing of said diesel furnace oil and gasoline occurring on board said vessel, as aforesaid, libelant has been damaged as follows: In the sum of \$32,914.56 on account of the diesel furnace [50] oil and gasoline contaminated on board the vessel, and in the further and additional sum of \$16,243.56 on account of the diesel furnace oil and gasoline which became contaminated in libelant's shore storage tanks when said contaminated products from the vessel were added thereto, making the total damage to libelant on account of said commingling and mixing the sum of \$49,158.12, to which latter sum there should be added as damages interest thereon from April 24, 1943, the date when said products should have been delivered to libelant in an uncontaminated condition, until paid, at the rate of 4% per annum, and to which sum there should also be added as damages the sum of \$8,000, the same being the attorney's fee reasonably incurred by libelant on account of the services of the attorneys, reasonably employed by libelant in this suit. [51]

Conclusions of Law

Upon the foregoing findings of fact, the Court separately states its conclusions of law as follows:

1. The War Shipping Administration was duly authorized on behalf of respondent, United States of America, to enter into said charter with libelant.

2. The Carriage of Goods by Sea Act (46 U. S. C. A. secs. 1300-1315 incl.) was by said charter and bills of lading made applicable to said carriage of said diesel furnace oil and gasoline, and imposed upon respondent, United States of America, the duty to exercise due diligence before and at the beginning of said voyage to make said vessel seaworthy and to properly man, equip and supply said vessel, and the duty to make all parts of said vessel in which said products were carried fit and safe for their reception, carriage and preservation, and the duty to properly and carefully load, handle, stow, carry, keep, care for, and discharge said products.

3. Said duties imposed upon respondent, United States of America, as such carrier were not impaired or curtailed by paragraph 7 or paragraph 19 or paragraph 20(a) of Part II of said charter, or by any other provisions of said charter.

4. Had said S. S. "Egg Harbor" been privately owned and possessed a libel in rem in admiralty might have been commenced by libelant at the time this suit was commenced and might have been thereafter maintained.

5. This suit was commenced and has been maintained in all respects in compliance with requirements of the Suits in Admiralty Act (46 U. S. C. A. secs. 741-752 incl.) pertaining to the commencement and maintenance of suits in admiralty against the United States of America.

6. Libelant is entitled to recover from respondent, [52] United States of America, as damages the sum of \$49,-158.12, together with interest at the rate of 4% per annum upon the latter sum from April 24, 1943 until said sum shall have been paid and the judgment therefor shall have been satisfied, together with the further and additional sum of \$8,000 as and for the attorneys' fee reasonably incurred by libelant herein and under said charter proper to be awarded to libelant as damages. In addition to said damages libelant is entitled to recover from respondent, United States of America, its taxable costs herein.

Dated this 16 day of Mar., 1945.

BEN HARRISON

Judge [53]

The foregoing is approved as to form.

LAWLER, FELIX & HALL,
JOHN M. HALL,
MARCUS MATTSON,

By JOHN M. HALL

Proctors for Libelant

CHARLES H. CARR,

United States Attorney

ROBERT E. WRIGHT,

Assistant United States Attorney

LILLICK, GEARY, McHOSE &
ADAMS, and A. F. MACK, JR.

By

Proctors for respondent, United States of America.

Entered Mar. 16, 1945. Book C.O. 31, Page 332.
Edmund L. Smith, clerk; by Murray E. Wire, deputy.

[Endorsed]: Filed Mar. 16, 1945. [54]

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF
CALIFORNIA CENTRAL DIVISION

In Admiralty No. 3490-BH

STANDARD OIL COMPANY OF CALIFORNIA, a
corporation,

Libelant,

vs.

UNITED STATES OF AMERICA and KEYSTONE
SHIPPING COMPANY, a corporation,

Respondents.

DECREE

This cause came on regularly for trial and was tried on the merits commencing on January 30, 1945, before the Honorable Ben Harrison, a Judge of the above entitled Court, at his courtroom in the Federal Post Office and Courthouse Building in the City of Los Angeles, California. Messrs. John M. Hall, Marcus Mattson and Wallace L. Kaapcke appeared as proctors for libelant, and Mr. A. F. Mack, Jr. and Assistant United States Attorney Robert E. Wright appeared as proctors for respondent. United States of America, which had theretofore appeared herein by filing an answer to the libel. [55]

It appearing that respondent, Keystone Shipping Company, a corporation had never been served with process or appeared herein, and that said respondent was neither an indispensable nor a necessary party to this suit, and good cause appearing therefor, it was ordered by the Court, without objection on the part of respondent, United States of America, that this suit be deemed to have been discontinued as against respondent, Keystone Shipping Com-

pany, a corporation, without prejudice to the continued prosecution of this suit by libelant against respondent, United States of America.

Pursuant to stipulation of the parties, it was also ordered that paragraph 9 of the libel should be deemed amended in accordance with an amendment filed, and that respondent, United States of America, without the filing of any additional pleading should be deemed to have denied each and every allegation of said paragraph 9 as amended, except the allegation that the S. S. "Egg Harbor" proceeded on her voyage to Point Wells, Washington, and arrived at Point Wells.

Having heard the proofs of the respective parties and considered the same and the records, papers and stipulations in the cause and all exhibits as well as the deposition of Lawrence C. Olsen, which was offered and received in evidence without objection, and the cause having been submitted for consideration and decision, and briefs having been filed, the Court, after deliberation, having heretofore made and rendered its opinion and having, upon motion of libelant, ordered that the libel be further amended to conform to the proof by adding a new paragraph, numbered 12, before the prayer, and a new paragraph, numbered 4, to the prayer, and having made and stated its findings of facts and conclusions of law thereon, now makes its decree in favor of libelant and against respondent, United States of America, by which it is [56]

Ordered, Adjudged and Decreed that libelant have and recover of and from respondent, United States of America, the sum of \$49,158.12, together with interest thereon at the rate of 4% per annum from April 24, 1943 until said sum shall have been paid and this judgment therefor shall have been satisfied, said interest to the date of this

decree amounting to \$3712.51, together with the further and additional sum of \$8,000 on account of attorneys' fees incurred by libelant; and it is also

Ordered, Adjudged and Decreed that in addition to the damages aforesaid libelant have and recover of and from respondent, United States of America, libelant's costs herein taxed in the sum of \$28.00.

Dated, this 16 day of Mar., 1945.

BEN HARRISON
Judge [57]

The foregoing is approved as to form.

LAWLER, FELIX & HALL,
JOHN M. HALL,
MARCUS MATTSON,
By JOHN M. HALL
Proctors for Libelant

CHARLES H. CARR,
United States Attorney
ROBERT E. WRIGHT,
Assistant United States Attorney
LILLICK, GEARY, McHOSE &
ADAMS, and A. F. MACK, JR.
By

Proctors for respondent, United States of America.

Judgment entered Mar. 16, 1945. Docketed Mar. 16, 1945. Book CO #31, page 342. Edmund L. Smith, clerk; by Murray E. Wire, deputy.

[Endorsed]: Filed Mar. 16, 1945. [58]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER CORRECT-
ING INADVERTENT OMISSION FROM THE
DECREE AND TO MAKE SUCH DECREE
CONFORM TO THE TRUTH

To Respondent, United States of America, and to Hon-
orable Charles H. Carr, United States Attorney,
Robert E. Wright, Assistant United States Attor-
ney, A. F. Mack, Jr., and Lillick, Geary, McHose
& Adams, Proctors for Respondent:

Please Take Notice that libelant will bring the follow-
ing motion on for hearing before the Honorable Ben
Harrison, Judge of the District Court, either in chambers
or in open court, and at such time as may be convenient
to the Court and proctor for libelant, or as soon thereafter
as said proctor may be heard.

Said motion will be based on the Findings of Fact and
Con- [59] clusions of Law and Decree in this cause.
The authorities supporting said motion are annexed here-
to.

Motion for an Order Correcting Inadvertent
Omission From the Decree and to Make Such
Decree Conform to the Truth

Libelant moves this Honorable Court for an order
correcting in the following particulars and nunc pro tunc
an inadvertent omission from the Decree herein, so that
said Decree shall conform to what was actually deter-
mined by the Court:

To insert in the blank in the next to the last paragraph of said decree the figures 3712.51 so that the clause in said decree containing said blank, which now reads as follows:

“said interest to the date of this decree amounting to \$.....,”

shall read:

“said interest to the date of this decree amounting to \$3712.51,”

Dated, April 6, 1945.

LAWLER, FELIX & HALL
JOHN M. HALL
MARCUS MATTSO

By John M. Hall
Proctors for Libellant [60]

AUTHORITIES SUPPORTING MOTION

The Court has inherent power to correct a judgment at any time to make it conform to the truth, i. e. to conform to what was actually determined by the Court.

Ex parte Marks, 136 Fed. 168 (C.C.A. 9, 1905)

This may be done nunc pro tunc.

Mellon v. St. Louis Union Trust Co., 240 Fed. 359 (C.C.A. 8, 1917)

It is never too late for the Court to “correct inadvertences, clerical errors, omissions, mere forms in its judgments, and the like.”

New River Collieries Co. v. United States, 300 Fed. 333, 334 (N.J. 1924, affirmed in 262 U.S. 341)

Even after the term has expired, it has been held that the Court may correct its judgment so as to allow interest theretofore omitted by the terms of the judgment.

Kahn v. Herold, 163 Fed. 947 (C.C.A. 3, 1908)
New River Collieries Co. v. United States, *supra*.

A judgment may always be reformed for the purpose of correcting computations made under it, regardless of whether the term at which it was entered has ended.

A. J. Woodruff & Co. v. United States, 154 Fed. 861 (N.Y. 1896) [61]

Thus, where a mortgage debt was ascertained and reported by the master as bearing interest from a certain date, and the report was approved by the Court, but the decree, as entered, allowed interest from a different date, the Court on petition corrected this as a manifest clerical mistake.

Fidelity Ins., Trust & Safe-Deposit Co. v. Roanoke Iron Co., 84 Fed. 744 (Va. 1898)

In the case at bar it is even more apparent that the order prayed for should be made. No modification is called for; merely the filling in of a blank. When filled in, such blank will make the decree conform to what was actually determined by the Court. As shown by the preceding clause, the Court awarded interest from April 24, 1943 until paid. To fill in the blank in line 6 would merely state the amount of such interest which had accrued to the date of the decree. [62]

We waive notice of the hearing of the foregoing Motion, whether in open court or in chambers.

Dated, March 26, 1945.

CHARLES H. CARR
United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

A. F. MACK, JR.

LILLICK, GEARY, McHOSE & ADAMS

By A. F. Mack, Jr.

Proctors for Respondent, United States
of America.

[Endorsed]: Filed Apr. 6, 1945. [63]

[Title of District Court and Cause.]

ORDER CORRECTING NUNC PRO TUNC IN-
ADVERTENT OMISSION FROM DECREE TO
MAKE SUCH DECREE CONFORM TO THE
TRUTH

Upon libelant's motion, notice of which has been waived in writing by proctors for respondent, United States of America, and

It appearing that the Decree herein contains an inadvertent omission, hereinafter referred to, the correction of which will make said Decree conform to what was actually determined by this Court in and by said Decree; therefore it is

Ordered that the Decree herein, dated March 16, 1945, be and it is hereby corrected nunc pro tunc as of the date thereof so that the clause in the next to the last paragraph of said Decree, which clause now reads as follows: [64]

"said interest to the date of this decree amounting to \$.....,"

shall read:

“said interest to the date of this decree amounting to \$3712.51,”

Dated, April 6th, 1945.

BEN HARRISON

Judge.

[Endorsed]: Filed Apr. 6, 1945. [65]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Ben Harrison, Judge of the United States District Court, Southern District of California, Central Division:

Petitioner, United States of America, respondent herein, prays that it may be permitted to take an appeal from the final decree entered in this case on March 16, 1945, to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the Assignment of Errors which is filed herewith.

Dated at Los Angeles, California, May 31, 1945.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

By A. F. Mack, Jr.

Proctors for Respondent, United States
of America

[Endorsed]: Filed May 31, 1945. [66]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading the Petition for Appeal of United States of America, respondent herein, for an appeal from the final decree entered in this case on March 16, 1945, and from the whole thereof, and on consideration of the Assignment of Errors filed herewith, and good cause appearing therefor,

It Is Ordered that the appeal herein be allowed as prayed for, and

It Is Further Ordered that a transcript of the record, testimony, exhibits and all proceedings herein be forthwith sent to the United States Circuit Court of Appeals for the Ninth Circuit, and [67]

It Is Further Ordered that no bond for costs on appeal is required of respondent.

Dated: May 31, 1945.

BEN HARRISON

United States District Judge

[Endorsed]: Filed May 31, 1945. [68]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

United States of America, respondent herein, assigns the following errors in these proceedings:

1. The District Court erred in rendering a decree for libelant in any particular, in any sum, or at all.

2. The District Court erred in holding that the War Shipping Administration was duly authorized and em-

powered on behalf of respondent, United States of America, to enter into and execute the charter of April 14, 1943, with libelant, particularly in regard to, but not limited to, Paragraph 34 concerning damages for breach of the charter.

3. The District Court erred in holding that the Carriage of [69] Goods by Sea Act was by the charter and bills of lading made applicable to the carriage of diesel furnace oil and gasoline in question.

4. The District Court erred in holding that Paragraph 25 of the charter prevailed over other paragraphs and terms of the charter modifying Paragraph 25 or conflicting therewith.

5. The District Court erred in holding that respondent's first affirmative defense, based upon Paragraph 19 of the charter, was not applicable and did not constitute a defense to the libel.

6. The District Court erred in holding that respondent's second affirmative defense, based upon Paragraphs 7 and 20(a) of the charter, was not applicable and did not constitute a defense to the libel.

7. The District Court erred in applying the incorrect rule and measure of damages.

8. The District Court erred in holding that libelant was entitled to the full amount of damages pertaining to the diesel furnace oil and gasoline in the sum of \$49,158.12.

9. The District Court erred in not holding that, if entitled to damages, libelant was not entitled to damages on account of the diesel furnace oil and gasoline which became contaminated in libelant's shore storage tanks when contaminated products from the vessel were added thereto, such damages being in the sum of \$16,243.56.

10. The District Court erred in finding that respondent at the time the charter was made should reasonably have understood or contemplated that the cargo would be received by libelant from the "Egg Harbor" into storage tanks already partly full.

11. The District Court erred in not finding that libelant failed to mitigate damages by refusing all further discharge of [70] both diesel furnace oil and gasoline until appropriate laboratory tests had been made and the results known when contamination of the gasoline was first discovered by libelant about 4:30 P. M. on April 23, 1943.

12. The District Court erred in not finding that no diesel furnace oil was contaminated by respondent.

13. The District Court erred in finding that the contents of libelant's shore tanks in question were uncontaminated before discharge from the S. S. "Egg Harbor" commenced.

14. The District Court erred in finding that respondent failed to exercise due diligence to make the vessel seaworthy by not using spectacle flanges during the voyage and discharge.

15. The District Court erred in holding that War Shipping Administration was duly authorized and empowered on behalf of respondent, United States of America, to contract in Paragraph 34 of the charter for attorney's fees as an item of damages for breach of charter.

16. The District Court erred in holding that libelant was entitled to attorney's fees in any sum or at all as damages.

17. The District Court erred in finding that if libelant were entitled to attorney's fees as damages the sum of \$8,000 was reasonable or reasonably incurred for attorney's fees.

18. The District Court erred in admitting evidence relevant to attorney's fees over the objection of respondent that attorney's fees were not specifically pleaded as a portion of the damages claimed, that the question of attorney's fees as a portion of such damages had not been previously considered in the case and that attorney's fees were not a proper item of damages under the Suits in Admiralty Act.

19. The District Court erred in holding that attorney's fees [71] were recoverable or proper as damages under the Suits in Admiralty Act.

Dated: May 31, 1945.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

Proctors for Respondent

[Endorsed]: Filed May 31, 1945. [72]

[Title of District Court and Cause.]

STIPULATION FOR USE OF ORIGINAL RE-
PORTER'S TRANSCRIPT AND EXHIBITS
ON APPEAL

It Is Hereby Stipulated between libelant and respondent, United States of America, through their respective proctors, that the originals of the following may be used in the appeal herein in lieu of copies, to-wit:

- 1) Reporter's transcript of the entire proceedings at the trial.
- 2) All exhibits introduced at the trial by either of the parties.

Dated: June 30, 1945.

LAWLER, FELIX & HALL
JOHN M. HALL
MARCUS MATTSON

By John M. Hall
Proctors for Libelant [78]

CHARLES H. CARR
United States Attorney
ROBERT E. WRIGHT
Assistant United States Attorney
LILLICK, GEARY, McHOSE & ADAMS
By A. F. Mack, Jr.
Proctors for Respondent

It is so ordered

BEN HARRISON
Judge

[Endorsed]: Filed Jul. 2, 1945. [79]

[Title of District Court and Cause.]

AFFIDAVIT OF A. F. MACK, JR.

State of California

County of Los Angeles—ss.:

A. F. Mack, Jr., being duly sworn, says:

That he is one of the proctors of record herein for respondent, United States of America; that the time for filing and docketing the Record on Appeal herein with the United States Circuit Court of Appeals for the Ninth Circuit expires July 10, 1945, under the citation issued by this Court under date of May 31, 1945.

That affiant has been advised by Theodore Hocke, Chief Deputy Clerk of this Court, that the Clerk is unable to prepare and file the Record on Appeal with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit within the time [80] fixed by the citation because the Reporter's Transcript has not been completed as yet and will not be completed before July 10, 1945.

That it is necessary to obtain further time and in order that there may be ample time affiant requests an additional period of thirty-six (36) days to and including August 15, 1945.

A. F. MACK, JR.

Subscribed and sworn to before me this 5th day of July, 1945.

(Seal)

BERNA WADDELL

Notary Public in and for the County of Los Angeles,
State of California

My Commission Expires February 4, 1949.

[Endorsed]: Filed Jul. 6, 1945. [81]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING OF CASE

Upon reading the Affidavit of A. F. Mack, Jr. herein and good cause appearing therefor,

Ordered that the time for the filing of the Record on Appeal and docketing of this case in the United States Circuit Court of Appeals for the Ninth Circuit by the Clerk of this Court be and it is hereby extended from the present expiration date of July 10, 1945, to and including August 15, 1945.

Dated: July 6, 1945.

BEN HARRISON
Judge

[Endorsed]: Filed Jul. 6, 1945. [82]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 82 inclusive contain the Original Citation and full, true and correct copies of Libel in Personam; Answer of Respondent United States of America; Stipulation dated December 6, 1944; Order for Discontinuance against Respondent Keystone Shipping Company; Amendment to

Paragraph 9 of Libel in Personam; Notice of Motion for an Order Permitting Libelant to Amend Libel to Conform to the Proof; Opinion; Amendment to Paragraph 12 of Libel in Personam and Order Permitting such Amendment; Findings of Fact and Conclusions of Law; Decree; Notice of Motion for an Order Correcting Inadvertent Omission from the Decree and to Make Such Decree Conform to the Truth; Order Correcting Nunc Pro Tunc Inadvertent Omission from Decree to Make Such Decree Conform to the Truth; Petition for Appeal; Order Allowing Appeal; Assignment of Errors; Praeceptum for Transcript of Record and Apostles on Appeal; Stipulation re Inclusion of Matters in Transcript of Record and Apostles on Appeal; Stipulation and Order for Use of Original Reporter's Transcript and Exhibits on Appeal; Affidavit of A. F. Mack, Jr. and Order Extending Time for Filing Record on Appeal and Docketing of Case which, together with Original Reporter's Transcript and Original Exhibits, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 10 day of Aug., 1945.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,

Chief Deputy Clerk.

[Title of District Court and Cause.]

Before the Honorable Ben Harrison

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

January 30, 1945

Appearances:

For the Libelant: Lawler, Felix & Hall, by John M. Hall, Esq., Marcus Mattson, Esq., and Wallace L. Kaapcke, Esq., 800 Standard Oil Building, Los Angeles, California.

For the Respondent United States of America: Lillick, Geary, McHose & Adams, by A. F. Mack, Jr., Esq., 634 South Spring Street, Los Angeles, California, and Robert E. Wright, Esq., Assistant United States Attorney. [1*]

Los Angeles, California, Tuesday, January 30, 1945.
10:00 a. m.

The Court: I will take up this motion for admission.

Mr. Hall: I desire to move for admission to this court of Wallace L. Kaapcke of San Francisco whom I certify is a member of good standing in the bar of California, and a person of good moral character.

The Court: Motion will granted. You may be admitted upon taking the oath, which will be administered by the clerk.

(The oath of admission was administered by the clerk.)

The Court: Gentlemen, are there any more additional facts that can be stipulated to besides those that are set forth in the stipulation?

Mr. Mack: I don't believe there are, your Honor. Of course, the stipulation goes as to what the witnesses, if

*Page number appearing at top of Reporter's Transcript.

called, would testify, and not as to the truth of the facts or the facts themselves.

Mr. Hall: Mr. Mack and I have investigated the situation pretty thoroughly and I think we have got about as far as we can in stipulation.

The Court: Very well. You may proceed.

Mr. Hall: I desire to file an amendment to the libel in personam, and order permitting the filing thereof. This is an amendment to paragraph 9 of the original libel, and there is a stipulation attached to this document that may be [2] filed and deemed denied in certain respects.

Paragraph 9 of the original libel was drawn upon the assumption that the entire quantity for which we were claiming damages came off the vessel. As has now been made plain by our printed memorandum, we are claiming damages not only for that quantity, but for a quantity in the shore tanks with which the cargo was mixed.

The Court: You gentlemen are not even able to stipulate as to what was the cause of the mixing?

Mr. Mack: That seems to be in some doubt, your Honor. We will put on all the testimony we have on the subject.

The Court: There is certainly something wrong some place along the line.

Mr. Mack: Yes, that is true.

The Court: It seems to me that the parties must have determined what was wrong when you could pump out of one tank and get a good product, and pump out of two tanks that became intermingled.

Mr. Mack: Well, we will put on what evidence we have, and Standard Oil will put on what evidence they have to show, I presume, that they are in the clear.

The Court: I didn't know but what maybe you gentlemen might be able to agree on that. You have been very frank and fair in your dealings and stipulations, and it seems to me that the parties should know what happened. The master of the vessel certainly should have been able to have [3] ascertained the difficulty. I didn't know but what maybe you might be able to agree as to just what happened and what was wrong. However, you may proceed.

Mr. Mack: Incidentally, I don't know whether the court has seen it or not, but we took the deposition of the master, and it was filed.

The Court: No. I have not seen any deposition.

Mr. Mack: It was filed last week in the clerk's office.

The Court: None of them have been called to my attention.

Mr. Mack: We will get that. It is the deposition of Captain Olsen.

Mr. Hall: Will the order be made permitting the amendment to which I referred?

The Court: Yes, take your order.

Mr. Hall: I would also like an order for discontinuance as against the respondent, Keystone Shipping Company. I believe that to be in order. Keystone Shipping Company has never been served with process and has never appeared. It was certainly the agent of the United States of America, and under the authorities I believe that would be proper to clear the record.

The Court: You may take your order. You may proceed.

Mr. Hall: Will you come forward, Mr. Kilbourn, please? [4]

FRED R. KILBOURN,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Fred R. Kilbourn.

The Clerk: Will you spell your last name?

The Witness: K-i-l-b-o-u-r-n.

Direct Examination

By Mr. Hall:

Q. What is your present occupation, Mr. Kilbourn?

A. I am plant superintendent of the Point Wells plant.

Q. Is that a plant owned and operated by Standard Oil Company of California? A. Yes.

Q. What department of that company operates the plant? A. The marketing department.

Q. How long have you been in the employ of the Standard Oil Company of California?

A. Since 1916.

Q. When did you go to Point Wells in their employ?

A. 1941.

Q. When did you become plant superintendent at Point Wells? A. I think in 1942.

Q. What are your duties in general at Point Wells as plant superintendent? [5]

A. I am directly responsible for the operations of the whole plant, that is, personnel and production and everything else.

Q. Is that what is known as a bulk terminal plant?

A. Yes.

(Testimony of Fred R. Kilbourn)

Q. You are in charge of the entire plant?

A. Yes.

Q. Was that true in April of 1943? A. It was.

Q. Is that a plant located on Puget Sound?

A. It is.

Q. How far from Seattle?

A. It is about fourteen miles north of Seattle.

Q. On the east shore of the Sound?

A. Yes, sir.

Mr. Hall: I ask that this plat be marked as Libelant's Exhibit 1 for identification.

The Court: Any objection to the admission?

Mr. Mack: No. If you want to put it in, Mr. Hall, I have no objection. You have shown it to me.

Mr. Hall: Very well.

The Court: It may be admitted as Libelant's Exhibit 1.

(The document referred to was marked as Libelant's Exhibit No. 1, and was received in evidence.)

Q. By Mr. Hall: I will show you, Mr. Kilbourn, the plat which has been marked as Libelant's Exhibit 1, and ask [6] you if that correctly shows the layout of the bulk plant at Point Wells as of April of 1943?

A. Will you repeat that again? Did you say the plant? Q. The layout of the plant.

A. This is the 1943 layout of the plant, yes, sir.

Q. Now, on this plat, there have been certain lines made in red. What do they represent?

A. They represent the gasoline lines, that is, cargo lines, from the dock to the tanks.

(Testimony of Fred R. Kilbourn)

Q. I notice that the red lines lead to tanks numbered 61 and 62. What were those tanks used for in April of 1943?

A. They were used for the storage of our standard gasoline.

Q. Now, will you understand that in subsequent questions that I ask you that I am asking for facts that existed in April of 1943? A. Yes.

Q. Were there any other tanks than 61 and 62 used for the storage of gasoline at that time?

A. No, not standard gasoline. Those were the only two tanks they had for storage of standard gasoline at that time.

Q. Now, I notice that the blue lines run to tanks which are numbered 8, 9, 40 and 41. What were those used for? [7] A. Diesel fuel oil.

Q. Were tanks 9 and 40 used for the reception of any diesel oil from the Steamship Egg Harbor?

A. No. Tanks 9 and 40 were not used for the reception of cargo from the Egg Harbor.

Q. Were there any lines or cross-over lines which connected the red lines shown on this chart with the blue lines shown on this chart so that fluid from a red line could get into a blue line or vice versa?

A. I will explain a little farther that our product lines from the dock to the tanks are all separate. That is, in all products in the gasoline and diesel oil products, they are all separate, with separate pumps.

(Testimony of Fred R. Kilbourn)

The Court: I understood from the stipulation that there was no dispute of the fact that there was comingling of the diesel and gasoline at the end of the hose leading from the tanker. Is that true?

Mr. Mack: No, if the court please. The stipulation was very specific. There was no stipulation as to how, when, or where any contamination occurred.

The Court: All right.

Q. By Mr. Mack: Well, then, there was no way that fluid in a red line could get into a blue line after it left the dock header. Is that correct?

A. Absolutely none.

Q. And no way in which a fluid in a blue line could [8] get into a red line after it left the dock header?

A. No way at all.

Q. I have used the term "dock header." Will you tell us what that is?

A. The dock header is a place connecting hoses from the boat to the dock pipeline.

Q. I notice on Libelant's Exhibit 1 the term "dock riser" is used. Is that the same as the dock header?

A. Yes.

Q. And it is kind of a hydraulic arrangement above the dock for the connection of the ship's hoses. Is that correct?

A. Yes.

Q. Are there separate headers or risers for gasoline as distinguished from diesel?

A. Yes.

Q. Are they painted different colors?

(Testimony of Fred R. Kilbourn)

A. Yes. Gasoline headers are painted red, and our diesel headers are painted green, and they also have the name of the products tagged on each header.

Q. Now, is there any arrangement on the header for the taking of samples as the fluid passes through the headers into the shore pipe?

A. Yes, there is on each header. On top of each header is a petcock with a short length of pipe probably one foot long curved to fill sample bottles as the product is pumped. [9]

Q. Was there any way in which fluid from any other line not colored either red or blue on this Libellant's Exhibit 1 might have gotten into a red or blue line?

A. No.

Q. There are no connecting lines?

A. None at all.

Q. Now, you recall that the vessel Egg Harbor arrived at Point Wells on April 23, 1943?

A. Yes.

Q. Were you in the plant that day?

A. I was.

Q. Do you recall about when the vessel tied up?

A. The vessel tied up around about 5:30, I believe, in the morning.

Q. There is a phrase on this chart reading "Ship discharged diesel fuel in tank 8 using this riser." Did the Egg Harbor tie up at the dock at the place indicated by the words "this riser"?

A. Yes, in our No. 2 berth, as we call it, on the south end of the outside portion of the dock.

(Testimony of Fred R. Kilbourn)

Q. How soon were the ship's hoses connected to the header at the dock?

A. Around 1:30 or 1:45, along there some place.

The Court: Were you present?

The Witness: I was when the hoses were connected up, yes, sir. [10]

Q. By Mr. Hall: Now, what products did this vessel carry?

A. It carried two products, Standard gasoline and Standard diesel fuel.

Q. Now, was the Standard gasoline a colorless fluid?

A. No. The Standard gasoline is a light amber color.

Q. What was the color of the diesel?

A. It was very dark brown.

Q. Now, were you on the dock when the hoses were run to the vessel?

A. Yes. I was on the dock when the hoses were put on the vessel.

Q. Did the Standard Oil people connect the hoses to the dock headers?

A. Yes. The dock men connected the hoses to the headers.

Q. Who made the connection between the hoses and the pipes on the vessel? A. The ship's crew.

Q. Were those hoses the property of Standard Oil Company of California? A. Yes.

The Court: What hoses are you referring to?

The Witness: The cargo hose, sir.

(Testimony of Fred R. Kilbourn)

The Court: The one that connects to the ship's hose?

The Witness: From the ship to the dock. [11]

The Court: I know, but who has the hose?

The Witness: I don't think this ship had any hose of its own. A lot of these ships don't carry hose. I don't know whether the Egg Harbor had their hose or not, but it is almost customary for the company to use its own hose. They are 50 foot long.

The Court: You don't know whether the Egg Harbor used theirs or yours?

The Witness: We used our own hose.

The Court: You used your own hose?

The Witness: Yes. There are only the two hoses from the boat to the dock.

Q. By Mr. Hall: There were two hoses?

A. Yes, sir.

Q. One went from a vessel connection to a header on the dock for the reception of gasoline, did it not?

A. Yes.

Q. And one went from a vessel connection to a header on the dock for the reception of diesel oil, did it not?

A. Yes, sir.

The Court: Just a moment. I understand the stipulation does cover, though, that the tests were made of the gasoline and diesel oil in the tanks, and they were found intact. Is that not true?

Mr. Mack: Excuse me, your Honor, I didn't quite catch that. [12]

(Testimony of Fred R. Kilbourn)

The Court: The gasoline and diesel oil in the tanks of the vessel were not commingled?

Mr. Mack: That is right. Samples were taken by the Standard Oil people at Point Wells. I believe probably it will come out in the testimony.

The Court: I thought that was a part of the stipulation.

Mr. Hall: It was a part of the stipulation, your Honor, that samples were taken from the vessel's tank at Point Wells, and that by a visual inspection the contents appeared to be all right. Now, I want to show by this witness how those samples were taken to explain the contamination which was later discovered.

The Court: All right.

Q. By Mr. Hall: You said each of these hoses was 50 feet long? A. Yes.

Q. Take the gasoline hose, was that a clean hose?

A. It was a brand new hose, never been used. It was an 8-inch hose.

Q. Was the diesel hose a clean hose? A. Yes.

Q. Did the ship's crew make attachments of those hoses so far as the vessel's pipes were concerned?

A. Yes, they did.

Q. Were any samples taken from them?

A. Well, the gauger took samples of tanks on board the [13] boat.

Q. What was his name? A. Lonsdale.

Q. Just how did he take the samples, by lowering the bottles?

(Testimony of Fred R. Kilbourn)

A. Yes. They have little containers that hold about a 16-ounce bottle. The bottle is lowered into the tank probably midway and then they take it out and look at it.

Q. Did those samples look all right?

A. Those samples were fine.

Q. Did they smell all right?

A. They smelled all right. There was no odor of diesel and vice versa.

Q. Then, did the vessel start to discharge the cargo?

A. Yes. They started pumping the Standard gasoline first.

Q. Did there come a time when they were discharging both products?

A. Yes. The diesel oil they started, oh, about an hour or three-quarters of an hour later.

The Court: First they started pumping gasoline?

The Witness: Yes, and then followed it up with diesel.

Q. By Mr. Hall: About what time did the discharge of gasoline from the vessel start?

A. The gasoline started around 1:45.

Q. The pumps that controlled this discharge were [14] located on the vessel, were they not? A. Yes, sir.

Q. Into what tank was the gasoline run when it was first discharged from the vessel?

A. It was pumped into tank 62.

Q. And into what tank was the diesel discharged when it was first discharged from the vessel?

A. That was discharged into tank 8.

(Testimony of Fred R. Kilbourn)

Q. Now, did tank 62 have any Standard gasoline in it before the product from the vessel was discharged into it? A. Yes, it did.

Q. How much?

A. Well, there was about 11,339 barrels of Standard gasoline.

Q. Did tank 8 have any diesel furnace oil in it before the diesel was discharged from the vessel into that tank?

A. Yes. There was 2,376 barrels in that tank.

The Court: Just a moment. Let me get that clear in my mind. How much gasoline was in tank 62 at the time you started to pump?

The Witness: There was 11,339 barrels.

The Court: That was the amount of gasoline in tank 62 when you started to pump it from the Egg Harbor?

The Witness: Yes.

The Court: How about the diesel? [15]

The Witness: Well, there was—

The Court: That is what tank?

The Witness: Tank No. 8. There was 2,376 barrels in that.

Q. By Mr. Hall: Now, was the 11,339 barrels of Standard gasoline in tank 62 good, uncontaminated, merchantable stock? A. Yes.

Q. Was the 2,376 barrels of diesel in tank 8 good, merchantable, uncontaminated stock? A. It was.

Q. Now, as this discharging of the Standard gasoline and the diesel progressed, were samples of those products taken at the bleeders on the dock header?

(Testimony of Fred R. Kilbourn)

A. Yes. The gauger started in taking samples of the bleeders on the headers when the boat started to pump. As soon as it started to pump, they took samples.

Q. That was true of both gasoline and diesel?

A. Yes.

Q. How often did the gauger take samples?

A. On this boat, every hour.

Q. Was it the duty of that gauger to report anything unusual to you that might be observed with respect to those samples? A. Yes, it was.

Q. Now, did there come a time during the afternoon [16] when the gauger told you that he observed something unusual about the samples?

A. Yes. Around 4:15 or 4:30, he called my attention. I happened to be out on the dock near the dock office and he called me down there and said that the gasoline was badly off color. He said it was very brown and dark. He said, "There is something wrong here."

Q. Was that in a sample he had just taken?

A. Yes. Just around 4:20 he had taken a sample.

Q. Did he call to you from where he was?

A. Yes. He called from the headers. He was quite excited that there was off color in the gas tank.

Q. Did he show you a sample?

A. He did. There was a 4-ounce sample bottle he had in his hand, and he showed it to me.

Q. Was it dark in color? A. Yes, very dark.

Q. Was that sample taken from bleeders on the gasoline headers? A. Yes.

A. Yes. I took another one right away to see how it looked. It was the same color.

(Testimony of Fred R. Kilbourn)

Q. Did you, yourself, take a sample at that time?

Q. What did you do then?

A. Well, I called out to the pump men to stop pumping immediately. [17]

Q. Did the pumping stop immediately?

A. Yes, on all products.

Q. Did you go on board the vessel? A. I did.

Q. Did you make inquiry of any one of the vessels or inquire for any one on the vessel?

A. Yes. I asked for the pump man and the mate.

Q. Now, do you remember telephoning for any representatives of the company of the vessel's operators to come out and see what the trouble was?

A. Yes. We called up Mr. Hicks and Mr. Stevens from Seattle to come out.

Q. Had they been in the plant earlier in the day?

A. Yes, they were out earlier in the day.

Q. Well, now, before Mr. Stevens and Mr. Hicks came out to the plant, did you go on the vessel with Mr. Simonsen? A. Yes.

Q. Who is he? A. Marine superintendent.

Q. Did you go with him on the vessel? A. Yes.

Q. Did you make inquiry for the captain?

A. We did.

Q. Was he there? A. He was not there.

Q. Did you make inquiry for the first mate? [18]

A. We did.

Q. And the first mate was not on board?

A. No.

Q. What mate was on duty?

A. The second mate.

(Testimony of Fred R. Kilbourn)

Q. Did you talk to him? A. We did.

Q. Now, did you inquire for the pump man?

A. Yes, we did.

Q. Was the pump man on duty?

A. He was not.

Q. Well, what pump man was on duty?

A. Some relief pump man was on duty at the time.

The Court: When you first started to pump, would there be a test made at the time of the beginning of the pumping?

The Witness: That is customary, sir.

The Court: As I understand it, you first started to pump the gasoline?

The Witness: Yes.

The Court: About 1:45?

The Witness: Yes.

The Court: And then about an hour later they started to pump diesel oil?

The Witness: It wasn't quite an hour later. It was about a half hour later that they started pumping diesel oil.

The Court: Then, there was no test made between 1:45 [19] and 2:45?

The Witness: There was no test made on the gasoline. There was a test made on gasoline when we first started to pump the diesel oil. We made one, and then we doubled the both of them up. It is customary for the gauger—he stays in the yard as a general rule. The gauger takes samples every hour.

Q. By Mr. Hall: Was a sample taken of gasoline every hour until this discolored sample was obtained?

A. Yes.

(Testimony of Fred R. Kilbourn)

The Court: Then, as I understand, it would be probably about 3:45 before they found that the gasoline was off color?

The Witness: No, I would say around 4:00 or a little after 4:00. Maybe it was 4:20. It was around 4:00 or 4:20.

The Court: Then the first two tests would probably show O.K.?

The Witness: Yes. There were three tests which showed pretty good on the gasoline. It was fine as far as we could tell.

Q. By Mr. Hall: Now, did Mr. Stevens and Mr. Hicks come out to the plant? A. Yes.

Q. Did they see you when they came out to the plant?

A. Yes.

Q. Did they go on board the vessel?

A. Yes, they did. [20]

Q. And did they later tell you that they thought pumping might be resumed? A. They did.

Q. What did they say about it?

A. Well, they came up on deck and said they thought that disposed of this matter and we could start in pumping again.

Q. Then, you did resume pumping?

A. We did, yes.

Q. Did you take samples then as soon as the pumping started?

A. I took samples myself then. I stood right at the header and took samples of the gasoline as it was pumped off.

Q. One after the other?

A. Yes, one after the other.

(Testimony of Fred R. Kilbourn)

Q. Did the color of the gasoline clear up?

A. No.

Q. How long did that pumping go on?

A. I imagine 15 minutes.

Q. Was the pumping stopped then?

A. Yes, it was stopped.

Q. Well, now, what next occurred with respect to the pumping of the cargo?

A. Well, we talked it over and mutual agreement was made to shut off all the valves in the boat and just pump one product. [21]

Q. You mean somebody made that suggestion and the others thought that would be a good plan. Is that what you mean by "mutual agreement"? A. Yes.

Q. To pump one product at a time? A. Yes.

Q. Well, then, did they pump one product at a time?

A. Yes. They started pumping diesel oil.

Q. Have you the deck log? A. Yes.

Q. I notice in the deck log of the vessel, Mr. Kilbourn, it is stated that at 9:30 they began discharging diesel oil. Does that conform to your recollection as to when they started to discharge diesel oil alone?

A. It is the approximate time, I think.

Q. Now, when that discharge of the diesel oil was resumed, did you continue to run it into tank 8?

A. Yes.

Q. For how long did you continue to run that diesel oil into tank 8?

A. Until about 6:00 o'clock in the morning.

Q. To what depth in tank 8? A. About 18 feet.

(Testimony of Fred R. Kilbourn)

Q. And then was the flow of diesel oil diverted into some other tank? A. Into tank 41. [22]

The Court: Just a moment. Do I understand, then, in the diesel oil tank, that after you started the pumping of diesel oil it came out in good order?

The Witness: So far as we could tell it was in good order. We had no laboratory. We just used the smell and sight test.

The Court: But it appeared to be in good order?

The Witness: Yes.

The Court: And you continued to dump that into tank 8 where a mixed product had theretofore been dumped?

The Witness: Into tank 8, yes.

The Court: In other words, as I understand it, tank 8 had a certain amount of diesel oil before you started to pump?

The Witness: Yes.

The Court: And after you started to pump and you found a contaminated product flowing into tank 8, into the tank line that led to tank 8—

The Witness: We didn't find the contaminated product until we got all through pumping diesel oil.

Mr. Hall: I will clear it up, your Honor, perhaps.

Q. By Mr. Hall: Was there any way of telling whether the diesel oil was contaminated except by smelling it at that time? A. At that time, there was not.

Q. The only other method would have been a laboratory analysis, would it not, which would have taken time? [23] A. Yes.

(Testimony of Fred R. Kilbourn)

Q. Did you until sometime in the morning of the following day, that is, April 24, did you at any time before that believe that the diesel oil was contaminated?

A. No.

Mr. Hall: Does that answer the point, your Honor?

The Court: Yes.

Q. By Mr. Hall: Now, going back to the evening of the first day, that is, April 23, were the samples taken from the vessel's tanks on the evening of that day?

A. They were.

Q. Do you recall what tanks they took the samples from? By the way, was it this gauger of yours that went over and took the samples?

A. Another gauger went on, a party by the name of Knudson.

Q. Were you with him?

A. I was on the deck of the boat. I didn't go to each tank, but I saw him taking samples.

Q. Do you know how deep he put his bottle into the tanks on that occasion?

A. Oh, I would judge around 12 feet, 12 or 13 feet in the center of the tanks.

Q. Now, that evening, did you take any samples from tank 62 containing the Standard gasoline?

A. We did. [24]

Q. Did you send those samples anywhere the following day?

A. Yes. We sent them the first thing Friday morning or the next morning, to Laucks Laboratories in Seattle.

(Testimony of Fred R. Kilbourn)

Q. Did you send samples for any other tank with those samples from the vessel's tank and the samples from tank 62?

A. Yes. We sent a sample from tank 8.

The Court: That is your own tank?

The Witness: Yes, sir.

The Court: He asked you whether there were any from tanks of the vessel.

Mr. Hall: Well, I think he just testified he sent in the samples from the vessel's tank, from No. 62 and from boat tank 8. Is that right?

The Witness: Yes.

Q. By Mr. Hall: Now, did Lauks Laboratories report to your office by telephone the results of their analyses of these samples?

A. Yes. As soon as they worked through the analysis, they telephoned out to us the results of the test.

Q. Did they subsequently confirm that report by a written report? A. They did.

Mr. Hall: I ask that these sheets be marked as Libelant's Exhibits next in order.

The Court: Any objection? [25]

Mr. Mack: No, no objection. Of course, technically speaking I suppose they are hearsay, but these people are here from Laucks Laboratories and I suppose would back up their reports. So, I won't make any objection.

The Court: They may be admitted.

(The documents referred to were marked as Libelant's Exhibit Nos. 2, 3, 4 and 5, and were received in evidence.)

[LIBELANT'S EXHIBIT NO. 2]

CERTIFICATE

Bonded and Authorized
By
New York Produce Exchange
American Bureau of Shipping
U. S. Treasury Department
Limited Referee Chemist
American Oil Chemists Society

Laboratories :
Seattle, Wash.
Vancouver, B. C.

Representatives :
Tacoma, Wash.
Portland, Ore.
Astoria, Ore.
Spokane, Wash.
Aberdeen, Wash.

Members Of :
American Wood Preservers Ass'n
American Council Of Commercial
Laboratories
Pacific N. W. Section Of The American
Ass'n Of Cereal Chemists
Assoc. Of Consulting Chemists
And Chemical Engineers, Inc.
American Society For Testing Materials
Am. Inst. Mining & Metallurgical Engrs.
Amer. Institute Of Chemical Engineers
American Institute Of Chemists
American Chemical Society
National Safety Council

Cable Address "Laux"
Established 1908

LAUCKS LABORATORIES, INC.

Analytical and Consulting

Chemists • Assayers

Spectrographers

Metallurgists

Engineers

Samplers • Inspectors

911 Western Ave. Seattle

April 28, 1943

Report No. 82715

Standard Oil Company of California

Point Wells, Washington

(Libelant's Exhibit No. 2)

Gentlemen:

We hereby certify that we have tested samples of

DIESEL OIL

submitted to us by you, and we have to report as follows:

Marked	Flash Point (Pensky-Martin)
A—5-P	178° F.
B—5-C	178° F.
C—5-S	178° F.
D—6-P	174° F.
E—6-C	175° F.
F—7-P	177° F.
G—7-C	175° F.
H—7-S (composite of 2 qt. cans) ..	174° F.

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:ch

This report is submitted for the exclusive use of the person, partnership, or corporation to whom it is addressed, and neither the report nor the name of these laboratories nor of any members of its staff, may be used in connection with the advertising or sale of any product or process without written authorization. This company accepts no responsibility except for the due performance of inspection and/or analysis in good faith and according to the rules of the trade and of science.

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs.
U. S. A. Lib. Exhibit No. 2, Filed Jan. 30, 1945. Ed-
mund L. Smith, Clerk; by M. E. W., Deputy Clerk.

[LIBELANT'S EXHIBIT NO. 3]

CERTIFICATE

Bonded and Authorized
By
New York Produce Exchange
American Bureau of Shipping
U. S. Treasury Department
Limited Referee Chemist
American Oil Chemists Society

Laboratories :
Seattle, Wash.
Vancouver, B. C.

Representatives :
Tacoma, Wash.
Portland, Ore.
Astoria, Ore.
Spokane, Wash.
Aberdeen, Wash.

Members Of :
American Wood Preservers Ass'n
American Council Of Commercial
Laboratories
Pacific N. W. Section Of The American
Ass'n Of Cereal Chemists
Assoc. Of Consulting Chemists
And Chemical Engineers, Inc.
American Society For Testing Materials
Am. Inst. Mining & Metallurgical Engrs.
Amer. Institute Of Chemical Engineers
American Institute Of Chemists
American Chemical Society
National Safety Council

Cable Address "Laux"
Established 1908

LAUCKS LABORATORIES, INC.

Analytical and Consulting
Chemists • Assayers
Spectrographers
Metallurgists
Engineers
Samplers • Inspectors

911 Western Ave. Seattle

April 28, 1943

Report No. 82716

Standard Oil Company of California
Point Wells, Washington

Gentlemen:

We hereby certify that we have tested the sample of
GASOLINE
submitted to us by you, and we have to report as follows:

(Libelant's Exhibit No. 3)

Marked: 3-C

Distillation:

Boiling Point	104° F.
5 cc off at.....	134° F.
10 cc off at.....	150° F.
20 cc off at.....	174° F.
30 cc off at.....	196° F.
40 cc off at.....	218° F.
50 cc off at.....	238° F.
60 cc off at.....	257° F.
70 cc off at.....	274° F.
80 cc off at.....	290° F.
90 cc off at.....	315° F.
95 cc off at	336° F.
End Point	358° F.
Recovered	98.5%
Residue	1.0%
Loss	0.5%

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:ch

This report is submitted for the exclusive use of the person, partnership, or corporation to whom it is addressed, and neither the report nor the name of these laboratories nor of any members of its staff, may be used in connection with the advertising or sale of any product or process without written authorization. This company accepts no responsibility except for the due performance of inspection and/or analysis in good faith and according to the rules of the trade and of science.

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 3. Filed Jan. 30, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

[LIBELANT'S EXHIBIT NO. 4]

CERTIFICATE

Bonded and Authorized
By
New York Produce Exchange
American Bureau of Shipping
U. S. Treasury Department
Limited Referee Chemist
American Oil Chemists Society

Laboratories :
Seattle, Wash.
Vancouver, B. C.

Representatives :
Tacoma, Wash.
Portland, Ore.
Astoria, Ore.
Spokane, Wash.
Aberdeen, Wash.

Members Of :
American Wood Preservers Ass'n
American Council Of Commercial
Laboratories
Pacific N. W. Section Of The American
Ass'n Of Cereal Chemists
Assoc. Of Consulting Chemists
And Chemical Engineers, Inc.
American Society For Testing Materials
Am. Inst. Mining & Metallurgical Engrs.
Amer. Institute Of Chemical Engineers
American Institute Of Chemists
American Chemical Society
National Safety Council

Cable Address "Laux"
Established 1908

LAUCKS LABORATORIES, INC.

Analytical and Consulting
Chemists • Assayers
Spectrographers
Metallurgists
Engineers

Samplers • Inspectors

911 Western Ave. Seattle

April 26, 1943

Report No. 82684-A

Standard Oil Company of California
Point Wells, Washington

Gentlemen:

We hereby certify that we have tested the sample of
DIESEL FUEL OIL

submitted to us by you, and we have to report as follows:

Marked: Diesel Fuel Oil Tank 8

Flash Point (Closed Cup).....Flashes at room temperature
(70° F.)

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:jm

(Libelant's Exhibit No. 4)

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[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 4. Filed Jan. 30, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

[LIBELANT'S EXHIBIT NO. 5]

CERTIFICATE

Bonded and Authorized
By
New York Produce Exchange
American Bureau of Shipping
U. S. Treasury Department
Limited Referee Chemist
American Oil Chemists Society

Laboratories:
Seattle, Wash.
Vancouver, B. C.

Representatives:
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Established 1908

LAUCKS LABORATORIES, INC.

Analytical and Consulting

Chemists • Assayers

Spectrographers

Metallurgists

Engineers

Samplers • Inspectors

911 Western Ave. Seattle

April 26, 1943

Report No. 82684-B

Standard Oil Company of California
Point Wells, Washington

(Libelant's Exhibit No. 5)

Gentlemen:

We hereby certify that we have tested the sample of

GASOLINE

submitted to us by you, and we have to report as follows:

Marked: Stnd. Gas Tank 62

Distillation:

Boiling Point	102° F.
5 cc off at.....	136° F.
10 cc off at.....	151° F.
20 cc off at.....	180° F.
30 cc off at.....	208° F.
40 cc off at.....	234° F.
50 cc off at.....	256° F.
60 cc off at.....	278° F.
70 cc off at.....	299° F.
80 cc off at.....	330° F.
87 cc off at.....	374° F.
88 cc off at.....	392° F.
89 cc off at.....	410° F.
89 cc off at.....	428° F.
90 cc off at.....	460° F.
92 cc off at.....	510° F.
% off at 122° F.....	2.0
% off at 140° F.....	7.0
% off at 158° F.....	12.0
% off at 176° F.....	19.0
% off at 194° F.....	25.0
% off at 212° F.....	31.5
% off at 230° F.....	39.5
% off at 248° F.....	46.0
% off at 266° F.....	55.0

(Libelant's Exhibit No. 5)

% off at 284° F.....	64.0
% off at 302° F.....	72.0
% off at 320° F.....	77.5

Standard Oil Co. of Calif. -2- Report No. 82684-B

% off at 338° F.....	81.5
% off at 356° F.....	84.0

Recovered	92.0%
Residue	7.0%
Loss	1.0%

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:jm

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[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 5. Filed Jan. 30, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Q. By Mr. Hall: I show you documents which have now been marked Libelant's Exhibits 2, 3, 4, and 5, and ask you if those are the reports which came to you from Laucks Laboratories with respect to these samples taken from the vessel's tanks, the sample taken from tank 62, and the sample taken from shore tank 8.

A. That is correct.

(Testimony of Fred R. Kilbourn)

Q. Now, with reference to the document which is marked Libelant's Exhibit 2, where was the oil taken from which is referred to in that report?

A. It was taken from the ship's tanks, 5 port, 5 center and 5 starboard tank, 6 port and 6 center, 7 port, 7 center and 7 starboard tanks of diesel.

Q. Does that report show a merchantable or an un-merchantable product?

A. It shows a merchantable product.

Q. Now, I show you the document which is marked Libelant's Exhibit 3, and ask you where the fluid was taken [26] from which is the subject of that report?

A. That was taken from the gasoline tanks of the boat. That is 2, 3 and 4.

Q. Is that in other words a combination sample from the gasoline tanks 2, 3 and 4?

A. Yes. We call it a composite sample. They are all poured together and taken in one test.

Q. Can you tell us why you didn't have a separate report with respect to separate samples from the vessel's tanks 2, 3 and 4.

A. To speed up the tests was the main reason.

Q. Now, where was the fluid taken from which is the subject of the report which is marked Libelant's Exhibit 4?

A. That was drawn from tank No. 8, diesel fuel tank.

Q. First, let me ask you, does the report which is marked Libelant's Exhibit 3 show a merchantable or un-merchantable product?

A. That is a merchantable product.

(Testimony of Fred R. Kilbourn)

Q. Does the report which is marked Libelant's Exhibit 4 show a merchandable or unmerchutable product?

A. Unmerchutable.

The Court: What type does that refer to?

Q. By Mr. Hall: Where was the fluid taken from that is illustrated in Libelant's Exhibit 4?

A. From tank 8.

Q. This is diesel? [27] A. Diesel fuel.

Mr. Mack: That was the shore tank?

The Witness: Yes.

Q. By Mr. Hall: Where was the fluid taken from which is the subject of the report which is marked Libelant's Exhibit 5? A. From tank 62.

Q. Does that show a merchantable or unmerchutable product? A. Unmerchutable product.

Q. And by "unmerchutable" you mean a contaminated product? A. Yes.

Q. Now, were these telephone messages you got from Laucks Laboratories on the morning of April 24 the same in substance as these written reports later shown you?

A. Yes, they were.

Q. Now, was the receipt of that telephone advice from Laucks Laboratories the first intimation or first knowledge you had had that the diesel shore tank 8 was contaminated? A. It was.

Q. I think you said already that none of the samples of diesel taken at the dock headers had indicated by smell any contamination with gasoline. Is that correct?

A. That is right.

Q. Now, the log of the vessel states that on April [28] 24, 1943, they finished discharging all diesel oil at

(Testimony of Fred R. Kilbourn)

6:10 in the evening. Does that conform to your recollection? A. It does.

Q. Did they then start to pump the gasoline out of the vessel?

A. They did. Not right away, it was a couple of hours which elapsed before they started the gasoline.

Q. Now, when they started to run the gasoline out of the vessel, did they first run it into shore tank 62?

A. They started to pump again to shore tank 62.

Q. Now, will you tell us what procedure they followed in running that gasoline out of the vessel in seeing that each tank was clear before they changed to another shore tank?

A. When they started to pump the gasoline by itself, it was still off color, so they decided to try each tank and see how long before it cleared up, and they started to pump the bottoms off each tank until they were cleared. Tank 2 on the vessel was a little longer clearing up. It took about a half hour, showing there was diesel oil on the bottom of the tank.

Q. These tanks in the vessel are run crosswise of the vessel, are they not? A. Yes.

Q. And there is a port, a starboard and a center tank on each of those crosswise sections. Is that correct? [29]

A. Yes.

Q. Now, the gasoline on the vessel was in tanks 2, 3 and 4? A. 2, 3, 4 and 9.

Q. However, up to the time we are talking about now, there hadn't been anything discharged out of tank 9?

(Testimony of Fred R. Kilbourn)

A. That is right.

Q. Now, then, in running out the gasoline separately, did they run it first out of tank 4?

A. It was out of tank 4.

Q. Were samples taken at the dock headers frequently as that was run? A. Yes.

Q. Now, did the samples taken at the dock headers clear up so that a point was reached where the gasoline coming out of tank 4 was clear? A. Yes.

Q. Did they switch and take the gasoline out of some other tank? A. Yes. They started tank 3.

Q. Did they do the same thing there? A. Yes.

Q. Pumped out of that until the gasoline showed clear? A. That is right.

Q. Did they then go to another tank?

A. They went to tank 2. [30]

Q. Did they pump that until the gasoline showed clear? A. They did.

Q. Now, your information as to what tanks they were pumping from, of course, came from information people on the vessel gave you, did it?

A. Yes, that is right.

Q. While they were clearing these three tanks, was the gasoline being run into shore tank 62?

A. It was.

Q. All right. Now, when the product in each of those tanks was running clear, was there a shift made to another shore tank?

(Testimony of Fred R. Kilbourn)

A. Yes. As soon as it cleared up, we shifted over to tank 61. Tank 62 was then closed.

Q. The suction lines that take the fluid out of the ship's tank are on the bottom of the tank, are they not?

A. That is correct.

Q. Now, the log of the vessel shows that on April 25, 1943, they finished discharging all gasoline at 5:10 in the morning. Is that about your recollection?

A. That is right.

Q. Now, after the entire cargo was discharged from the vessel, were any further samples taken from shore tanks 41 and 61?

A. Yes; we took samples from tanks 41 and 61.

Q. Did you take another sample out of tank 8? [31]

A. We did.

Q. Were those samples sent to Laucks Laboratories for testing? A. They were.

Q. Did you subsequently receive reports from Laucks Laboratories as to those tests? A. We did.

Mr. Hall: I ask that these sheets be marked as Libelant's Exhibits next in order.

The Court: Any objection?

Mr. Mack: No objection.

The Court: They may be admitted.

(The documents referred to were marked as Libelant's Exhibits Nos. 6 and 7, and were received in evidence.)

[LIBELANT'S EXHIBIT NO. 6]

CERTIFICATE

Bonded and Authorized
By
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American Bureau of Shipping
U. S. Treasury Department
Limited Referee Chemist
American Oil Chemists Society

Laboratories :
Seattle, Wash.
Vancouver, B. C.

Representatives :
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Established 1908

LAUCKS LABORATORIES, INC.

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Chemists • Assayers

Spectrographers

Metallurgists

Engineers

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911 Western Ave. Seattle

April 26, 1943

Report No. 82686

Standard Oil Company of California
Point Wells, Washington

(Libelant's Exhibit No. 6)

Gentlemen:

We hereby certify that we have tested the sample of
DIESEL FURNACE OIL
submitted to us by you, and we have to report as follows:

Marked: A—Diesel Furnace Oil Tank #41

B—Diesel Furnace Oil Tank #8

A

B

Flash Point (Pensky-Martin)..160° F. Flashes at room
temperature
(73° F.

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:jm

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[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs.
U. S. A. Lib. Exhibit No. 6. Filed Jan. 30, 1945. Ed-
mund L. Smith, Clerk; by M. E. W., Deputy Clerk.

[LIBELANT'S EXHIBIT NO. 7]

CERTIFICATE

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Vancouver, B. C.

Representatives :
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911 Western Ave. Seattle

April 30, 1943

Report No. 82760-A

Standard Oil Company of California

Point Wells, Washington

Gentlemen :

We hereby certify that we have tested the sample of
GASOLINE

submitted to us by you, and we have to report as follows :

Marked : 4/26/43, Std. Gas Egg Harbor

Tank #61

Distillation :

Boiling Point 105° F.

5 cc off at..... 132° F.

(Libelant's Exhibit No. 7)

10 cc off at.....	150° F.
20 cc off at.....	180° F.
30 cc off at.....	208° F.
40 cc off at.....	228° F.
50 cc off at.....	245° F.
60 cc off at.....	261° F.
70 cc off at.....	277° F.
80 cc off at.....	295° F.
90 cc off at.....	319° F.
95 cc off at.....	347° F.
End Point	370° F.
% off at 122° F.....	3.0
% off at 167° F.....	15.5
% off at 212° F.....	31.5
% off at 257° F.....	57.5
% off at 302° F.....	83.0
% off at 347° F.....	95.0
Recovered	97.5%
Residue	1.5%
Loss	1.0%

Respectfully submitted,

LAUCKS LABORATORIES, INC.

By L L Hefferline

LLH:mh

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[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 7. Filed Jan. 30, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

(Testimony of Fred R. Kilbourn)

Q. By Mr. Hall: I show you a document which has been marked Libelant's Exhibit 6 and ask you where the fluid came from which is the subject of that report.

A. Diesel tank 41 and diesel tank 8.

Q. What does that report show with respect to the diesel from tank 41? Was it a merchantable or unmerchantable product?

A. 41 was a merchantable product.

Q. With respect to the diesel from shore tank 8, what was that? A. Unmerchantable.

Q. And by unmerchantable, you mean contaminated?
[32] A. Yes.

Q. Where was the fluid there taken from that is the subject of the report which is marked Libelant's Exhibit 7? A. That was taken from tank 61.

Q. Does that show a merchantable or unmerchantable product? A. A merchantable product.

Q. In April of 1943 were there any facilities at Point Wells for reprocessing contaminated petroleum products?

A. None whatever.

The Court: Haven't you gentlemen stipulated as to the means of arriving at damages, if any? In other words, the necessity of bringing the product back to El Segundo for reconditioning?

Mr. Hall: We have stipulated that witnesses would testify, yes, your Honor, as to the damages, based upon the theory that we are entitled to damages not only for what came out of the vessel, but for that residue in the tanks which was contaminated.

The Court: I understand that. I was wondering if it was going to be necessary to bring in evidence to the effect that it was necessary to bring this contaminated oil back

(Testimony of Fred R. Kilbourn)

to El Segundo for refinement, on whether it had a marketable value in that condition at *Fort Wells*, or whether there were other facilities for such refinement.

Mr. Mack: I think he has covered it already, your [33] Honor. I am sure the situation is that they had no facilities up there whatever for refining.

The Court: Then the contaminated products would not have a marketable value. I think that should be established, in other words, whether the contaminated product had a marketable value at Point Wells.

Mr. Mack: Perhaps Mr. Kilbourn can establish that.

The Court: Would those contaminated products have any marketable value in their commingled condition?

The Witness: No, sir. They would have none at all.

The Court: Can you tell me how many barrels of merchantable product was removed from the vessel?

The Witness: I can't without the records.

Mr. Hall: May I have the court's question and the answer read?

(The record was read.)

The Court: The thought I have in mind, counsel, is that there is perhaps going to be some argument between you as to whether or not you are entitled to recover for the portion in the tanks contaminated, and I would like to bring out the segregations in order that the facts may be clear, so that when this case eventually goes to the Circuit Court, they will be able to finally settle it without sending it back for a retrial on some issues.

Mr. Hall: Yes, sir. I will see that you are furnished with those figures. The amendment to the libel that I put in [34] this morning of course gives a part of those.

(Testimony of Fred R. Kilbourn)

That, plus the stipulation which I will later read, I believe, will complete the set of figures.

Q. By Mr. Hall: When you saw that discolored sample that was taken about 4:30 in the afternoon of the first day, did you come to the conclusion at once that diesel had gotten into the gasoline? A. We did.

Q. And that was indicated by the color and the smell, was it?

A. The color and the smell both. There was a very decided smell of diesel oil.

The Court: The gasoline got into the diesel, too, didn't it?

The Witness: It did, yes.

Mr. Hall: That is all.

Cross-Examination

By Mr. Mack:

Q. Mr. Kilbourn, referring again now to Libellant's Exhibit 1 for a minute. Referring to the layout up there at Point Wells, is my understanding correct that from the time diesel or gasoline from the vessel started into your risers, from that time on, you had sole charge and control of the respective products?

A. We had from the shore tank, from the dock on, yes.

Q. That was what I meant. [35] A. Yes.

Q. Now, as I understand it, you furnished the gasoline hose and the diesel hose that attached to the lines on the vessel? A. We did, that is right.

Q. And then the two discharging hoses, as they are sometimes called, attached to the lines on the vessel which were 50 feet long. Is that right? A. Yes.

(Testimony of Fred R. Kilbourn)

Q. Which were attached to the risers on the dock?

A. That is right.

Q. Then the risers on the dock carried the respective products wherever you routed them. Is that right?

A. They followed the pipe line through the tank, and the routing in the tanks was done in the valves of the respective tanks.

The Court: But you routed the gasoline at these risers, I believe you call them?

The Witness: Yes, risers.

The Court: And then you, from that time on, routed to the various tanks?

The Witness: That is right, yes.

Q. By Mr. Mack: Putting it another way, Mr. Kilbourn, from the minute the gasoline and the diesel went into the discharging hose, the ship, from that time on, had nothing whatever to do with where those products went, did it? [36]

A. No, that is right.

Q. Now, at any time during the discharging operation, did you tell the ship or any of its crew or operators where you were putting these respective products?

A. No.

Q. In other words, to use a familiar phrase of the street, it was strictly your own business where you put them. Isn't that right?

A. Yes.

Q. Now, is there any kind of a device or contraption at the Point Wells plant called a "manifold"?

A. There is, yes.

Q. Where would that be?

A. In the pump house.

Q. Where is the pump house?

A. It is located right here between the boiler room and tank three and four.

(Testimony of Fred R. Kilbourn)

Q. It is right on the map where the words "block valve" in red ink appear, right in that vicinity?

A. Yes.

Q. In moving the products from the ship after they came into your lines, around in your yard there, was a pump necessary? A. No, no pump was necessary.

Q. What carried the products to their ultimate destination in your storage facilities? [37]

A. The pump from the ship.

Q. Now, with respect to the gasoline, I understand the gasoline lines are marked in red on this Exhibit No. 1? A. Yes.

Q. And with respect to the particuuar discharging operations of the Egg Harbor in April of 1943, which dock riser was used for the gasoline?

A. The dock riser right adjacent to the diesel oil, probably, oh, eight or ten feet apart.

Q. Let me draw a line out from that in pencil and mark that "G." That is the dock riser that you used for the gasoline on that occasion? Is that right?

A. Yes.

Q. Now, would you just show me there where the gasoline would come, what course it would follow?

A. The gasoline would travel along here, along this line here, out here, around the dock here, and this tank, this valve being open.

Q. You have just drawn the course on the Exhibit 1 from the dock riser "G" along to the left side of the paper to the first red line, and along that red line to the point marked "valve" and then to the right and up to tank 62? A. Yes.

(Testimony of Fred R. Kilbourn)

Q. This first joint here, Mr. Kilbourn, from "G" to the left of the diagram where the one red line goes up to the top of the page, are there any valves or anything to force the [38] gasoline up that line?

A. No valves, no.

Q. Is that blocked off somehow?

A. It has a tee.

Q. All right. Now, when we get up to the line running toward the top of the paper to where there is a notation marked "valve," what are those things called valves there?

A. There is a valve on the 16-inch line, and on the 10-inch line. They are merely control valves when pumping is done from the shore tanks.

Q. Is one of those valves necessary to prevent backing up over to the left here?

A. That is right, yes. That can be used for that. This valve is very seldom used, if ever. It is just in case of an emergency or when something breaks where you shut that valve off.

May I explain the routine of pumping?

Q. Yes.

A. This part here is shut off and we are pumping out to the dock.

Mr. Hall: Pardon me, counsel. The witness, in his last answer, referred to the red lines running on the chart to the left of what is called the lunch room and the office.

The Court: I think we will take a 5-minute recess.

(Short recess.)

The Court: Proceed, gentlemen. [39]

Mr. Mack: May I have the last question and answer read?

(Testimony of Fred R. Kilbourn)

(The record was read.)

Q. By Mr. Mack: Mr. Kilbourn, two facilities there at Point Wells, or tanks 61 and 62, as I understand it, are the only tanks used for storage of gasoline?

A. Of Standard gasoline.

Q. Of Standard gasoline? A. Yes.

Q. Incidentally, what was the capacity of those tanks, or what is the capacity?

A. They are around about 135,000 barrels each.

Q. Now, to get back to the diagram again, perhaps it would be clearer if I just took a pencil and traced lightly in the general vicinity of the pipe line that carried the gasoline.

The Court: It is clear, counsel.

Mr. Mack: All right, if it is clear, your Honor.

The Court: He has made it clear. The only things I am interested in are these other red lines that are supposed to carry gasoline. In other words, as I understand it, there is a valve here, and over here to the pump house, and as I understand it, they use the pump house when they are loading oil.

The Witness: Yes.

The Court: Now, this other red line that shows on the left of the page towards the pump house?

The Witness: That leads to another one on the dock. [40] There are two lines. This is a 10-inch line. This is a 16-inch line. This is the one we tried to pump into because there is less pressure. The larger line will take more gasoline. You can pump it through this header, through there, and go around just as well, but it is a smaller line in here and naturally retards the ship's pumping.

(Testimony of Fred R. Kilbourn)

Q. By Mr. Mack: Is my understanding correct, Mr. Kilbourn, that in this particular operation the pump house on shore was not involved in any way?

A. It was not involved in any way except that the gasoline—it was not used in pumping. This line is open here. These valves are all shut on the dock here. Both of these lines are open all the time.

Q. Well, we will mark one "V" and the other one "V-1."

Then, as I understand you, Mr. Kilbourn, so far as the gasoline was concerned only, it went in the course indicated from dock riser "G" along to the first joint, then up to the center of the page and around to the right and into tank 62? A. Yes.

Q. Now, you mentioned that in tank 62, before any discharge from the Egg Harbor was commenced, there were 11,339 barrels of Standard gasoline. Is that right?

A. Yes.

Q. How was that figured?

A. Well, do you mean how they arrived at that?

Q. Yes. [41]

A. We gauge those tanks prior to the ship's pumping.

Q. In other words, are the tanks calibrated so that according to a certain depth there are so many barrels in the tanks?

A. The tanks themselves are not calibrated. There is a sheet that shows the number of barrels there are per inch or foot or whatever you have. The measuring is done by an automatic tape. It is in front of you at all times.

(Testimony of Fred R. Kilbourn)

Q. Do you have the original reading here in court or down at Los Angeles for the 11,339 barrels?

A. We have.

Q. Could you show it to me, or your figures on that?

A. I think it is that 171 there, Mr. Hall. That is tank 8. This is tank 62. It is four feet six and fifteen-sixteenths less eight and seven-sixteenths of water. 473,696 gallons.

Q. Now, this sheet, as I understand it, over at the left it says "On hand at close," and then underneath it says "or before commencing business April 24, 1943."

A. The pumping was done April 23rd. I can explain that. We have a gauger and the gauge book is here. He goes around and puts it in his book. We do our gauging at 5:00 o'clock in the morning. He goes down and does his gauging at 5:00 o'clock in the morning. We want to get the reports in the office by 1:00 or 2:00 o'clock. We have some 61-odd tanks to do, and it takes him that long. [42]

Now, the twenty-third gauge was made at 5:00 o'clock in the morning. When the Egg Harbor came in, we naturally gauged the tanks for the Egg Harbor at 1:00 o'clock or whatever time that we started pumping. So, we use that gauge on that tank 8 and 61 until that boat leaves our dock. It may be there two or three days, and during that time we have no gauge except the original gauge, so we naturally use that original gauge.

That gauge was originally made on the 23rd, which was the time we made one on the Egg Harbor. There was no other chance, so we used that last gauge. That was the Egg Harbor's gauge on the 23rd and it appears on the 24th sheet as on the work sheet. You will probably find the same gauge on the 25th.

(Testimony of Fred R. Kilbourn)

Q. In other words, this gauge of 473,696 gallons appearing on sheet dated April 24, 1943, is the gauge for tank 62 before discharge from the Egg Harbor was commenced? A. That is right, yes.

Q. How many gallons in a barrel?

A. 42 gallons in a barrel.

Mr. Hall: May I interrupt?

Mr. Mack: Yes.

Mr. Hall: May we have the record show that this sheet you are referring to shows a temperature of 51 degrees Fahrenheit whereas you and I, in this lawsuit, have always been using a measurement at 60 degrees. [43]

Mr. Mack: That is right.

Mr. Hall: So, there has to be that further adjustment.

Mr. Mack: Yes.

Q. By Mr. Mack: This sheet was taken at a temperature of 51 degrees? A. Yes.

Q. What difference is there, if any, in the volume of gasoline at, say a temperature of 51 degrees and 60 degrees with the amount involved here?

A. Well, the volume would be less at the lower degree than at the higher degree. It expands at the higher degree.

Q. It expands as the temperature increases?

A. Yes.

Q. Now, correspondingly, from the sheet you also have in front of you, there appears to be a gauge for tank 61? A. Yes.

Q. Is that gauge for tank 61 as it was before any gasoline from the Egg Harbor was put into tank 61?

A. No. That gauge was made at 5:00 o'clock in the morning.

(Testimony of Fred R. Kilbourn)

Q. I see. 5:00 o'clock in the morning of April 24th?

A. Yes.

Q. Now, you stated that the gasoline in tank 62, 11,339 barrels, was merchantable. Is that correct?

A. Yes, that was merchantable gas. We were using that gas right along. [44]

Q. Were you selling it to customers?

A. Yes, to customers and delivering out of that tank.

Q. Now, likewise, Mr. Kilbourn, with respect to the diesel oil, I believe you stated there were 2,376 barrels in tank 8 before discharging from the Egg Harbor commenced?

A. That is right.

Q. Do you have the gauge record on that?

A. Yes, it is the same date, the work sheet. We have fuel oil and gas oil on a different sheet. It is one foot eleven-sixteenths less one and three-eighths inches water.

Q. You are pointing to another sheet, which is the daily bulk stock record, dated April 24, 1943. Is that right?

A. Yes.

Q. And you are pointing to the figure 99,459 gallons. Is that right?

A. Yes.

Q. Translated into barrels, that is 2,376 barrels?

A. Yes, at 51 degrees.

Q. That is at 51 degrees?

A. That is right.

Q. That measurement was likewise made before the Egg Harbor commenced discharging diesel oil. Is that correct?

A. Yes.

Q. That was likewise merchantable, was it not?

A. Yes, merchantable product.

(Testimony of Fred R. Kilbourn)

Q. Had you been selling out of that tank number 8?
[45] A. We had, yes.

Q. Now, the gauge figures that you have mentioned here, were the Standard Oil Company's alone, were they not? A. They were, yes.

Q. The ship had nothing whatever to do with the taking of any of those figures? A. No.

Q. Now, Mr. Kilbourn, when this discharge of gasoline commenced from the Egg Harbor on April 23rd around 1:45 in the afternoon, was a sample taken by Standard Oil at your riser? A. It was, yes.

Q. And what did that sample show?

A. The sample showed it had very good color and there was no sign of any diesel contamination at all in there.

Q. In other words, so far as you could tell at that time, it was merchantable gasoline?

A. Yes, clear gasoline.

Q. Then, about a half hour later or so, as I understand it, they started pumping diesel oil?

A. That is right.

Q. Now, when they started pumping diesel oil about a half hour later, did you take a sample from your bleeder or riser?

A. I did not. The gauger took the sample as soon as we started pumping to be sure it was diesel oil coming through [46] that line.

Q. And so far as could be told at that time it showed the diesel oil to be all right?

A. It looked fine and dandy.

Q. Now, if we stay on gasoline for a little while, was another sample taken from your bleeder or riser after the sample at 1:45? A. It was.

(Testimony of Fred R. Kilbourn)

Q. When was that?

A. Oh, approximately about an hour later.

Q. About an hour later? A. Yes.

Q. What did that sample show?

A. It was all right. It was apparently very good.

Q. So, up to that point, your records show the gasoline coming out of the boat was all right?

A. It was all right.

Q. Now, was another sample taken from the bleeder or riser by your people after that one?

A. Yes. There was another taken about 3:00 o'clock or 3:30. It was 3:00 o'clock, I believe.

Q. What did that show?

A. It showed very good. It was a good color gas.

Q. So, up to that point at 3:00 o'clock or 3:30, your test showed the gasoline coming off the boat was all right? A. Yes. [47]

Q. Now, up to that point, did you have any check or measurement of gasoline that had come off the Egg Harbor in good shape?

A. Up to the second or third test?

Q. Yes, at 3:30.

A. No. We had no accurate test. The gauger goes out to these tanks and looks to see that there is no break in the line. He looks at the automatic gauge, and of course it is bouncing up and down from the pulsation of the pumps. That is the only test. There was no definite quantity that can be shown how much is in there. It is just a precaution to show that the tank isn't pumped over.

Q. At Point Wells, did you have any meter on the hose as the gasoline came off, any gallonage or barrelage?

A. No, there was nothing of that kind.

(Testimony of Fred R. Kilbourn)

Q. So that up to the time of 3:30 in the afternoon at least, you had no test made or any measurement taken to show how much clear gasoline had come off the ship?

A. No.

Q. When was it that the first test you made showed the gasoline was off?

A. A little after 4:00, about 4:20, I believe. It was between 4:00 and 4:20. About 4:20, I think it was.

Q. Then, on the gasoline, your gauger, I believe Mr. Lonsdale—

A. Mr. Lonsdale. [48]

Q. Mr. Lonsdale informed you that the test on the gasoline was off about 4:20 in the afternoon of the 23rd?

A. That was Mr. Knudson, not Lonsdale. They change gaugers about a quarter to 4:00.

Q. I see. It was at that time, as I understand it, that you then told the vessel to stop discharging?

A. That is right.

Q. And discharging was immediately stopped on both products. Is that right?

A. On both products, yes.

Q. Now, how long was it before any discharging operation was again commenced from the vessel?

A. Well, I would say around about, oh, maybe 6:00 or 7:00 o'clock. It was between 6:00 and 7:00 o'clock some time.

Q. Were you there the whole time?

A. I was, yes.

Q. When discharging was commenced again, was it of one product or both?

A. No. They started both pumps up again, started both diesel and the gas.

(Testimony of Fred R. Kilbourn)

Q. Now, was a sample taken by you or somebody under your supervision as pumping was resumed from the vessel? A. Yes, it was.

Q. With respect to the gasoline, what did that show, if anything?

A. That showed a dark contaminated color. [49]

Q. Is my understanding correct that within a few minutes after that time, say 15 minutes or so, discharging of both products was again stopped? A. It was.

Q. Then, discharging of one product at a time was commenced. Is that right? Was it some time later?

A. Yes. A few hours later we started on the diesel oil, the pumping alone.

Q. And then diesel was continued until approximately 6:00 o'clock the following morning?

A. That is right, 6:00 o'clock the following evening.

Q. 6:00 o'clock the following evening?

A. Yes. It was between 4:00 o'clock and 6:00 o'clock, I believe. It was the following p. m.

Q. Now, at any time during any of those tests on gasoline that we have been talking about, was there a representative of the United States or of the vessel present?

A. Yes. I showed Mr. Stevens and Mr. Hicks at the time they came out there. I showed him when they started the second pumping, the off color of that gasoline.

The Court: Wouldn't the second mate be representative of everybody in the absence of the first mate and the captain?

Mr. Mack: Yes, but I don't believe anybody else was shown—

(Testimony of Fred R. Kilbourn)

Q. By Mr. Mack: Was the second mate shown any samples?

A. I couldn't say. He may have been told. There was [50] quite a bit of excitement around there and everybody knew about it. I forget whether the officer on board came and looked at it or not.

Q. Generally speaking, Mr. Kilbourn, you had charge of the situation on shore and the vessel's crew most usually stayed on the vessel. Is that right?

A. Yes.

Q. Now, if we can go back to the diesel for a moment, the diesel was started about a half hour after the gasoline, wasn't it?

The Court: You have asked and answered that question before, counsel.

Mr. Mack: All right.

Q. By Mr. Mack: The samples taken of the diesel were taken in a similar manner to the gasoline samples?

A. They were, yes.

Q. About every hour? A. Yes.

Q. Were the samples of the diesel taken every hour after pumping of the diesel alone was being done?

A. Yes.

Q. Who took those samples? A. The gauger.

Q. Would that be Mr. Kundson or Mr. Lonsale?

A. Either Mr. Knudson or Mr. Lonsdale. Mr. Lonsdale relieved Mr. Knudson after the eight-hour shift was up. They [51] switched off and on on a long pumping.

Q. Now, when was it that you first learned, if you did, that there was something wrong with the diesel?

(Testimony of Fred R. Kilbourn)

A. Oh, it was the following 24th along, I would say, oh, between 11:00 o'clock and 1:00 o'clock in the afternoon. It was the middle of the afternoon.

Q. That was when you received a telephone report from Loucks Laboratories? A. Yes.

Q. You estimate that anywhere from 11:00 o'clock until 1:00 o'clock?

A. Around there some time. It was the middle of the day.

Q. Now, when you received that report from Loucks Laboratories, did you do anything about the diesel, so far as pouring it into any other tanks is concerned?

A. No. We were pumping tank 41 at that time and we just kept on pumping. We didn't change over at all.

The Court: You mean after you found out that the diesel in the tanks was contaminated, you continued to pump diesel?

The Witness: In tank 8, we finished pumping, and pumped tank 41 which was practically only a couple of hours pumping on 41 at the time.

The Court: And you continued to pump into this same tank?

The Witness: Yes. [52]

Q. By Mr. Mack: What is the capacity of tank 41?

A. I think that is a 53,000-barrel tank.

Q. Now, let us see if I am right on this. Did you commence pumping into tank 8 originally on the diesel, or tank 41? A. Tank 8.

Q. Tank 8? A. Yes.

Q. Now, what was the occasion for switching to tank 41?

A. Well, tank 8 wouldn't hold the whole cargo. It was a 37,000-barrel tank and we like to have more than

(Testimony of Fred R. Kilbourn)

one tank of diesel oil because we can either pump to the hills or the trucks and pump to a boat at the same time, getting two separate gauges as the boat—I am talking about a barge—37,000 or 40,000.

We can make an accurate gauge on the tanks without any withdrawal to the hills. So, as prearranged by the gauger and myself, we divided this cargo up and put half in tank 8 and half in tank 41. They were both down to what we call the pumping bottom. We couldn't pump any more. We figured about 18 feet in either tank.

I forget what the final division was. There was 18 feet in one and 19 in the other. So, we continued and got about 18 feet in tank 8, and then started pumping tank 41.

We did that so we would have an equal amount in each tank to draw from. [53]

Q. Tank 41, did that have any diesel oil in it before you started pumping? A. Yes, it did.

Q. How much did it have in it?

A. I will have to look at the sheet to see. Tank 41 had one foot ten inches, 144,236 gallons at 51 degrees.

Q. At 51 degrees? A. Yes.

Q. That would be something over 3,000 barrels in there? A. Yes.

Mr. Hall: Do you understand, Mr. Mack, that we are not making any claims for damages on account of contamination of either tanks 41 or 61?

Mr. Mack: Well, I don't know, Mr. Hall.

The Court: Your claim covers 2,376 barrels in tank 8, does it not?

Mr. Mack: It does cover 3,000-odd barrels in tank 41.

Mr. Hall: Oh, no. We are not making any claim on account of contamination of tank 41 either before the

(Testimony of Fred R. Kilbourn)

cargo went into it or after. The same is true of the gasoline in tank 61.

Mr. Mack: Tank 61 is the tank into which the clear gasoline was finally placed?

Mr. Hall: That is right.

Q. By Mr. Mack: Mr. Kilbourn, as I understand it, samples were taken from all the vessel's tanks before [54] discharging operations commenced. Is that right?

A. Yes.

Q. No samples were taken by you or under your supervision and direction. Is that right?

A. No samples were taken under my supervision?

Q. Yes.

A. Well, yes, the original samples is a routine check made by the gauger, but the second set of samples we took, I was out there on deck and told him to take those samples because we didn't have enough, a large enough quantity. We had to get a quart can of each, so we took the samples over again.

Q. Those samples all showed clear, as I understand it?

A. The original ones did, yes.

Q. That is what I mean, the original samples showed a clear, good product?

A. Yes, a good product.

Q. So if my understanding is correct that discharging from the vessel was held up until the original samples were taken and checked, and you, or one of your representatives, informed the vessel that it was in order to commence discharging?

A. Yes. That is the gauger's job to see that they meet his specifications, and then he tells the ship to go ahead and start pumping.

(Testimony of Fred R. Kilbourn)

Q. Did anybody from the vessel or any representative of the vessel come ashore there and inspect your plant and [55] layout? A. No.

Q. Now, let us see if I understand the Loucks reports we have here. I refer first to Libelant's Exhibit 2, which has to do with diesel oil, as I understand it. Is that right? A. Yes.

Q. This sample was taken from tanks 5, 6 and 7 of the vessel? A. Yes, tanks 5, 6 and 7 of the vessel.

Q. Those were individual samples?

A. Individual samples, yes.

Q. As I understand it, that shows all that diesel oil to be merchantable? A. Yes.

Q. Here is the next report, Libelant's Exhibit 3, and that has to do with gasoline. Is that right?

A. Yes.

Q. What tanks are those?

A. Those are tanks 2, 3 and 4.

Q. What do they show?

A. That is Standard gasoline. Those are merchantable.

Q. There are a number of statements on here. For instance "distillation: boiling point" and then so many degrees Fahrenheit. But, translated, it means merchantable. Is that right?

A. Yes. When you see "end point 358." you know that [56] is pretty good gasoline.

Q. Here is Libelant's Exhibit 4. That shows the flash point taken of diesel on tank 8?

A. That is right, of diesel on tank 8.

(Testimony of Fred R. Kilbourn)

Q. What does that show as to the merchantability?

A. It is unsatisfactory as merchantable.

Q. Why isn't that merchantable?

A. Well, it shows that the product flashes at room temperature, which is about 70 degrees, showing it was contaminated with gasoline.

Q. What is the usual flash point of diesel fuel oil?

A. Oh, good diesel will run about 170, or perhaps 150. It runs up to 170 or 175. Some grades are a little higher. You get some at 160 or 170 which is very good.

Q. So that a flash point of 70 degrees, in plain language, means that it take a lower temperature to ignite the product at 70 than it would at 170?

A. Yes.

Mr. Hall: May I have the last question and answer read?

(Record read.)

Q. By Mr. Mack: What is the ordinary gas point of flash of Standard gasoline?

A. Oh, it will flash at any temperature below down to minus. We don't use flash on gasoline. We use a distillation.

Q. What tank does Libelant's Exhibit 5 show on the Loucks report? [57]

A. It refers to tank 62 of Standard gasoline. It is an unmerchantable product. It has an end point of 510 degrees Fahrenheit, which is an indication of diesel being in the product.

(Testimony of Fred R. Kilbourn)

Q. Just so we are clear, Libelant's Exhibit 4 had to do with your shore tank No. 8? A. Yes.

Q. What is this Libelant's Exhibit No. 6, as long as we have it here?

A. Libelant's Exhibit 6 is a final report after the pumping was finished on diesel oil. It shows a test on tank 41 and tank 8, which is a check test on 8 again.

Q. That shows merchantable, does it?

A. It does on tank 41, and on tank 8, it definitely does not.

Q. It is good on tank 41 and bad on tank 8?

A. That is right.

Q. What is this Libelant's Exhibit 7?

A. That is the final test on tank 61 after pumping.

Q. What does that show?

A. That shows merchantable products.

The Court: I think we will take our afternoon recess at this time. I don't know how long this is going to last. We are going along very slowly. I don't know whether we should have later hours, or if you gentlemen are going to speed up. We have been all morning with this one witness to [58] bring out very few facts, and if that is the rate we are going, we will be here all week.

Mr. Mack: Well, your Honor, I want to go into these things.

The Court: All right. We will take a recess until 1:30, gentlemen.

(Whereupon, at 12:00 o'clock noon a recess was taken until 1:30 o'clock p. m. of the same day.) [59]

Los Angeles, California, Tuesday, January 30, 1945.
1:30 p. m.

The Court: Proceed, gentlemen.

FRED R. KILBOURN

resumed the stand as a witness by and on behalf of the libelant and was examined and testified further as follows:

Cross-Examination

(continued.)

By Mr. Mack:

Q. Mr. Kilbourn, as I understand it, the diesel was diverted about 6:00 o'clock on the morning of April 24th from your shore tank 8 into your shore tank 41. Is that right? A. Yes.

Q. And then the diesel continued into your shore tank 41 until it was all discharged from the ship, and as I understand it, the discharge stopped about 6:10 p. m. on April 24th. Is that right? A. That is right.

Q. Now, then, the sample you took from shore tank 41 after all the discharge was finished showed that that tank 41 was merchantable. Is that right?

A. That is right.

Q. Therefore, did you conclude that from the time the diversion took place into tank 41 about 6:00 o'clock in the morning of April 24th, the diesel that was discharged from the vessel into tank 41 was merchantable diesel? [60] A. Yes.

Q. Now, do you also conclude that for some period prior to 6:00 o'clock on the morning of April 24, the diesel that was being discharged from the vessel was merchantable?

(Testimony of Fred R. Kilbourn)

Mr. Hall: That is objected to as no proper foundation being laid. There has been no basis shown for the expression of opinion upon that particular point.

The Court: Well, the purpose was to determine whether there was any other merchantable oil or diesel which had been pumped into tank 8 after you had notice of the contamination. You wouldn't have any claim if you continued to cause that oil to commingle with the other.

Mr. Hall: That is true, your Honor, but the evidence so far shows that our first knowledge that the diesel was contaminated came somewhere between 11:00 o'clock and 1:00 o'clock on the 24th. Now, the change from tank 8 to tank 41 occurred at 6:00 o'clock or 6:20, whatever it is, in the morning.

The Court: I know, but he is trying to ascertain whether, before he changed to tank 41, they were getting merchantable oil, if he knows.

Mr. Hall: Then, I will add to my objection the fact that it is immaterial because we didn't know at that time that there was anything wrong with the diesel.

The Court: If the witness says he doesn't know, that is the answer. I don't know whether he knows or not. You may [61] answer the question.

The Witness: No. I didn't know, outside of the sight test that there was anything the matter. We couldn't tell until we had the flash on the diesel. Apparently it looked fine. It was a nice color. There was no apparent odor to it at all.

Q. By Mr. Mack: As I understand it, you got your Loucks report over the telephone between 11:00 o'clock

(Testimony of Fred R. Kilbourn)

and 1:00 o'clock in the afternoon, between 11:00 a. m. and 1:00 p. m. on April 24, about the diesel?

A. Yes.

Q. Now, that was with reference, however, to the contents of shore tank 8, was it not?

A. That is right.

Q. That sample from shore tank 8 had been taken in the evening of April 23rd?

A. No, it had not. It was taken on the morning of the 24th.

The Court: 5:00 o'clock in the morning.

The Witness: No, pardon me. It was taken around about 8:00 or half past 8:00.

Q. By Mr. Mack: Well, then, I misunderstood, because I understood that samples had been taken on the evening of April 23rd by Mr. Knudson.

A. Mr. Knudson took the samples on board the boat that evening, and tank 62— [62]

Q. In other words, the samples were taken on board the Egg Harbor by Mr. Knudson from the various tanks on the evening of April 23rd. Is that right?

A. Yes.

Q. Do you have any idea what time that was?

A. No, I have not. It was late in the evening I know.

Q. Was it before or after discharge of the diesel had started on that evening?

A. Oh, it was after the discharge started. Yes, it was after the discharge started.

The Court: Let me ask you this question. Did you put any more diesel oil in tank 8 after you learned that it was contaminated?

(Testimony of Fred R. Kilbourn)

The Witness: No.

The Court: How about the gasoline?

The Witness: No. We stopped pumping in tank 62 as soon as we stopped the original pumping at 4:30, I believe. There was no more put in the tank except what little there was in the line, we shoved in the tank to clear the line.

Q. By Mr. Mack: As I understand it, Mr. Kilbourn, you were already taking or receiving diesel in tank 41 when you learned the outcome of the report?

A. That is right.

Q. And then you continued to receive into tank 41 until all the diesel was discharged? A. Yes. [63]

Q. And the contents of tank 41, as determined from the tests taken after everything had been discharged, was merchantable? A. Merchantable, yes.

Q. Now, as I understand it, speaking about the diesel again, Libellant's Exhibit 2, this Loucks report, shows the test of the diesel oil from tanks 5, 6 and 7 of the Egg Harbor? A. Yes.

Q. And that test was made during the evening of April 23rd?

A. The test was made the following day.

Q. Excuse me. The samples from which the test was made, as shown on Exhibit 2, were taken during the evening of April 23rd? A. That is right.

Q. What time was that, as near as you recall?

A. Well, I think it was around 9:00 o'clock, half past 8:00 or 9:00 o'clock when we started pumping again.

Q. And the sample from 5, 6, and 7 of the ship's tanks showed merchantable diesel?

A. That is right.

(Testimony of Fred R. Kilbourn)

Q. So that at any rate around 9:30 or during the evening of April 23rd when the diesel samples were taken from tanks 5, 6 and 7 on the ship, the results of the test were merchantable diesel. Is that right? [64]

A. Yes.

Q. And pumping continued uninterrupted, as I understand it, during the night until about 6:00 o'clock the following morning when diversion was made from tank 8 to tank 41. Is that right? A. That is right.

Q. Was the diesel from the ship's tanks 5, 6 and 7 pumped during that night, do you know?

A. I don't know what tanks they pumped out during the night, whether they pumped all of them or separate ones, or how that came about.

Q. I am not clear, Mr. Kilbourn, when the sample was taken from shore tank 8.

A. It was taken between 8:00 and 9:00 o'clock in the morning, about 8:30, I imagine, Friday morning.

Mr. Hall: You mean the first sample, do you not?

Mr. Mack: Yes.

Mr. Hall: There was a later sample, you know, from that one tank.

Mr. Mack: That was about 8:00 or 9:00 o'clock in the morning of the 24th.

The Witness: Pretty close to 8:00, I imagine. It was 8:20 or 8:30 or around there.

Q. By Mr. Mack: And the results that you obtained from that sample and the test made by Loucks, you obtained some time between 11:00 o'clock and 1:00 o'clock? [65]

A. Yes, around there some time. It was the middle of the day.

(Testimony of Fred R. Kilbourn)

Q. And that result was bad?

A. That result was, yes, a 70 flash on that.

Q. Now, with respect to diesel oil, if there is gasoline in it, let us say, or it is contaminated with gasoline in any way, is there any change in the odor from it?

A. Diesel oil can be contaminated by a very small quantity of gasoline and the odor would not be detected at all. You have to have a pretty sensitive nose to smell gasoline in diesel.

Q. Ordinarily doesn't diesel oil of the kind handled here have a rather flat odor?

A. Diesel oil varies considerably in odor depending on the wash they put it through in the refinery. Some diesel comes through with practically no odor, and others have a very strong petroleum smell. I can't describe it, but it is very noticeable. In that case the diesel oil was very strong.

The Court: Well, I assume that a certain amount of contamination of the diesel oil with gasoline, if it was not too heavy, wouldn't hurt it any, would it?

The Witness: No. Gasoline could stand a certain amount of diesel oil.

The Court: And diesel oil could stand some gasoline?

The Witness: No, very little. You can take a tank that [66] has contained gasoline and pump it out dry and leave fumes in the tank and fill it up two-thirds or full, and there is enough gasoline vapors in there to lower the flash point four or five degrees without having any product in the tank at all. Of course, that isn't harmful because it allows a variance of 20 degrees there.

Q. By Mr. Mack: On the gasoline, as I understand it, there was no discharge from approximately 4:30 on

(Testimony of Fred R. Kilbourn)

the afternoon of April 23rd until the early evening of April 24th? A. That is right.

Q. During the interim, the diesel was going over. Is that right? A. Yes.

Q. And then the gasoline discharge was started a couple of hours or so after the diesel had stopped. Is that right? A. Yes.

Q. Now, what was the process there? I am not quite clear about what you did there when the gasoline first was resumed in the discharge.

A. We started on the single pumping. What we wanted to do was clear the lines of contaminated gasoline, that 18-inch line that runs from the dock to the tank 62. We wanted to clear that line of contaminated gasoline so that we could start pumping good gasoline.

Q. May I interrupt? You mean to clear that shore line? [67] A. Yes.

Q. Was it necessary to use your own pumping facilities?

A. No, we used the boat. We have no way of pumping from the boat. So, we started taking samples. I stood there myself and took samples of the headers. The ship's crew told me they were starting on one tank. I said, "All right. Pump a few minutes," and it was still brown. It started to clear up, and then we decided to pump from each tank to clear up any diesel that was in the bottom of the tank or in the pipe lines. They did it on the other three tanks, three and two. No. 3 cleared up readily, and No. 4 cleared up readily, and No. 2 took considerable time to clear up before we got clear gasoline. I think it was around, oh, 20 minutes or a half hour before we got clear gasoline through.

(Testimony of Fred R. Kilbourn)

After that was finished, we followed up the line and pumped this contaminated gasoline that was in the line to tank 62, and then changed over to tank 61 and resumed pumping.

The Court: Let me see if I understand this. Your first test that you made showed that each tank was uncontaminated?

The Witness: Yes.

The Court: And then when you started, after you had removed the diesel oil, your pumps reflected there was a certain amount of diesel oil in the bottom of the gasoline tanks?

The Witness: That is the only place we could figure it would be, and as they started pumping each new tank there [68] would be a period of contaminated gasoline and diesel coming out.

The Court: Well, your original tests didn't go to the bottom, did they?

The Witness: No. I imagine the test was around about 25 or 30 feet, and our samples are taken in the normal course about halfway down into the tank.

The Court: You don't know whether that diesel oil was there when the ship arrived, or whether during pumping operations it was dropped over into the other tank?

Mr. Hall: Does your Honor mean diesel oil in the bottom of the gasoline tanks?

The Court: I mean in the gasoline.

The Witness: That, I don't know.

The Court: But when you removed all the diesel and then started to pump the gasoline, at that time the bottom of the tanks first showed contamination?

(Testimony of Fred R. Kilbourn)

The Witness: They did, yes.

The Court: And after you had removed a certain amount of the bottom, as I understand it, the pump pulled from the bottom?

The Witness: That is right.

The Court: And that way it cleared up?

The Witness: Yes, it cleared up on those two tanks very readily, and the No. 2 tank took a little longer. It took at least a half hour to clear that up before we had clear [69] gasoline.

Q. By Mr. Mack: Now, as I understand it, the sample which had been taken from the ship's tanks 2, 3 and 4 the evening before, those were the gasoline tanks, the report of Loucks showed that as merchantable?

A. Tanks 2, 3 and 4, yes. That is good gasoline.

Q. Now, that sample, as I understand it, was a composite sample from tanks 2, 3 and 4?

A. That is right.

Q. Taken around 9:30 or so on the evening of April 23rd?

A. They took those samples at the same time they took the diesel, and it could have been any time after 6:00 or 7:00 o'clock, or until 9:00 any time.

Q. In other words, possibly the samples were taken before discharge of the diesel started around 9:30?

A. Could have been, yes, either way, before or afterwards.

Q. And the report. Libelant's Exhibit 3 on the sample from tanks 2, 3 and 4 of the ship, the gasoline tanks, showed good gasoline? A. Good gasoline.

Q. Then, as I understand it, when discharge of the gasoline commenced on Saturday evening, April 24, 1943,

(Testimony of Fred R. Kilbourn)

at 8:00 p. m., as shown in the log here, your tests or samples showed some contamination. Is that right? [70]

A. That is right.

Q. Those were visual tests?

A. Visual samples in the glass bottles, yes.

Q. You took, as I understand it, the gasoline out of tank 4 first until it cleared, and received gasoline out of tank 4 from the vessel first until it cleared?

A. Either out of tank 3 or 4. I don't know which one first, but one of those. Tank 2 was the last one we took it out from.

Q. At any rate, you took it out of 3 or 4, one or the other, and then finally No. 2? A. Yes.

Q. And tank 2 was the one that took a little longer to clear than tank 3 or 4. Is that right?

A. Yes.

Q. As I understand it, the procedure in discharging the gasoline at that time was to pump the bottoms first by means of the suction lines. Is that right?

A. I presume that is the way the boat pumps off through suction lines. I don't know any other way to get it off.

Q. Had you given any instructions to the vessel or anybody on board about the manner of pumping gasoline out of tanks 2, 3 and 4?

A. None except it was mentioned in general discussion with the mate or Mr. Hicks, I forget which, that it was coming out that way, and we noticed, as soon as they changed [71] over to one tank it started to clear up. We decided to pump each tank first to get it cleared out of whatever had been in the bottom or the pipe lines.

(Testimony of Fred R. Kilbourn)

Q. Now, when those samples were taken, Mr. Kilbourn, regarding tests 2, 3 and 4 on the evening of April 24th—

Mr. Hall: 23rd.

Mr. Mack: I am talking now about the samples taken as the gasoline started to clear.

Mr. Hall: Those were taken at the headers.

Q. By Mr. Mack: When the samples were taken at the headers, were any members of the ship's crew or the company's representatives there?

A. Well, I think when we started in—no. I don't think anybody was there at present except a conversation between the crew on deck; that is the officer on deck and ourselves on shore, that the samples were coming dark, and when we started lighting up again, we told them to shut off pumping again. It was all verbal. They may have seen some of the samples and may not.

Q. Now, according to Libellant's Exhibit 6, as I understand it, that was the result of samples of shore tanks 41 and 8 taken after all discharging had ceased?

A. That is right.

Q. And shore tank 8 showed off and shore tank 41 showed good diesel?

A. It showed good diesel is right. [72]

The Court: Doesn't the diesel oil and the gasoline mix or become completely commingled?

The Witness: It will if it is agitated.

The Court: And if the agitation ceases?

The Witness: It will not separate.

The Court: It will not separate?

The Witness: No.

(Testimony of Fred R. Kilbourn)

The Court: Well, how would you account for diesel oil being on the bottom of the tank of the ship and the gasoline on the top?

The Witness: Well, that is something I can't account for unless there was some leak back into the tank. The diesel oil being of heavier gravity will naturally settle on the bottom, and the gasoline will separate itself. Without agitation, it can flow more easily.

Q. By Mr. Mack: Mr. Kilbourn, are you able to fix any time or point at which, in your opinion, the diesel became contaminated?

A. I assume the diesel was contaminated during the process of the two pumpings. That is, after all this test was gone through and we got that low flash point, we figured it must have been when they were pumping both products together for the first three hours or so.

Q. So that between 2:20, or whenever it was, on the afternoon of April 23rd, and approximately 4:30 when they were pumping diesel and gasoline, that is when you feel the diesel [73] became contaminated?

A. That is when I feel it might. That is about the only place it could have come about because we shut off all valves and pumped the one product. That is the only time I could figure there was any chance for contamination in that period.

There might have been other chances for all I know, but that test, when we took it on tank 8, looked very much like that was when the contamination was taking place that evening.

Of course, that is an assumption, because we had no test made of the pumping.

(Testimony of Fred R. Kilbourn)

Q. Now, can you give me your best recollection whether the test on tank 8, shore tank 8, on the evening of April 23rd, was made before or after discharge of the diesel alone commenced?

Mr. Hall: Pardon me, counsel. The testimony was that that was on the morning of the 24th, from shore tank No. 8.

Mr. Mack: I am sorry. That is right.

The Court: I have listened to about all the questions I am going to listen to about criss-cross back and forth between these tanks, Mr. Mack.

Mr. Mack: Very well, your Honor. I am not trying to be tedious. I am trying not to overlook anything.

The Court: I don't know what you are trying to be, but you are getting to be.

Q. By Mr. Mack: Mr. Kilbourn, were there any samples [74] taken from gasoline by you or under your supervision, from shore tank 61 before discharge of gasoline commenced into it?

A. No. There is no sample taken of tank 61 before any pumping was commenced.

Q. What about shore tank 8 before discharging commenced from the Egg Harbor?

A. There was none there.

Mr. Mack: I think that is all.

Re-Direct Examination

By Mr. Hall:

Q. Was there any change made in the hoses from the vessel to the dock headers during this entire period we have been talking about?

A. There were no changes between the boat and the shore.

(Testimony of Fred R. Kilbourn)

Q. Referring to Libelant's Exhibit 1, I will ask you if the red line that apparently goes past the words "salt water pump house" and then up to something called a "block valve" and then down to another valve on the dock, is the line used when you are pumping gasoline out of either 61 or 62 onto a vessel?

A. Yes, that is right.

Q. Now, was that particular segment of the line that I have just mentioned, from V-1 valve through the salt water pump house, the block valve, and the block valve down to the dock, open at the time the gasoline was coming off the Egg Harbor? [75]

A. It was.

Q. Now, taking the entire red line shown on this exhibit, was there any mechanical device, either by a valve or otherwise, by which the flow of fluid from that line could be diverted into any other line?

A. No, there is not, or was not.

Q. And was there any mechanical device by which fluid from another line could be diverted into that red line?

A. There was not any connection at all between any other line.

Q. Was what you have just stated as being true with respect to the red line true also with respect to the blue line?

A. It is.

Q. Now, before the vessel started to unload, you have testified that there were samples taken from the vessel's tanks, and if I remember the testimony correctly, those bottle samples were taken from a point about halfway down the tank in the vessel. Is that correct?

A. Yes.

(Testimony of Fred R. Kilbourn)

Q. Is the same thing true with respect to the bottle samples that were taken from the vessel's tanks on the evening of April 23rd, that is, were they taken from a point about halfway down in the tank?

A. They were.

Q. Now, was it the practice at that time to take these [76] bottle samples from the vessel's tanks before the vessel discharged? A. It was.

Q. Was it the practice at that time to have those samples sent to a laboratory and tested before the vessel discharged? A. No, it was not.

Q. Then, if I understand you correctly, the purpose of those bottle sample tests before discharge commenced, was simply to ascertain the kind of commodity in a given tank by the appearance of the sample. Is that right?

A. Yes.

Q. Was there any other purpose?

A. Well, if there was, the only purpose would be in case of a contamination or a wrong product. If they billed us with Standard gasoline and had colored gas or road gas, we would catch it right there. We could tell by the color, or an aviation gas, which is a green gas.

Q. Now, after Mr. Hicks and Mr. Stevens came out to the plant and went aboard the vessel, and after a period of 15 minutes or so, according to your testimony, the pumps were started again, and discharging started again through both lines? A. Yes.

Q. Was that upon orders of either Mr. Hicks or Mr. Stevens? [77]

A. I forget which gentleman told us, but he said he figured that that disposed of the matter and we should go ahead; it was all right to go ahead and start pumping again.

(Testimony of Fred R. Kilbourn)

The Court: That has been testified to before, counsel. It has been covered.

Mr. Hall: I am sorry. I didn't know it had.

Q. By Mr. Hall: Now, when you went on board the tanker with Mr. Simonsen, you talked with the second mate, I think you said? A. Yes, sir.

Q. Did you ask him what the trouble was?

A. Yes. We asked him what seemed to be the trouble.

Q. What did he say?

A. Well, he said he didn't know, he not being a tanker man. I think it was his first trip on a tanker. He said the valves had been set by the first mate or the pump man, I forget which, and when they left the ship, it was supposed to be all right, and he didn't know anything about manipulation of the valves.

Q. Where was the second mate when you were talking to him, you and Mr. Simonsen?

A. We went up to his cabin. He was in his cabin and he walked out on the deck *after* the cabin and talked to us for awhile.

Q. You have made reference to 11,339 gallons of Standard gasoline that was in tank 62 before unloading [78] commenced, and to 2,376 gallons of diesel in tank 8 before unloading commenced. Are those quantities given to us at 60 degrees Fahrenheit? A. Yes.

Q. And is that the temperature which is used as a standard temperature for measuring petroleum products in the petroleum industry?

A. It is a 60 degree. Everything is corrected to 60 degrees.

Mr. Hall: That is all.

(Testimony of Fred R. Kilbourn)

Mr. Mack: Mr. Hall, I think you inadvertently said "gallons."

Mr. Hall: If I did, I should have said "barrels."

Q. By Mr. Hall: Did you understand me to mean barrels in my last question?

A. Yes, barrels is correct.

Mr. Hall: That is all.

Mr. Mack: That is all.

The Court: You are excused.

(Witness excused.)

L. SIMONSEN,

called as a witness by and on behalf of the libelant, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: L. Simonsen. [79]

Direct Examination

By Mr. Hall:

Q. Are you employed by Standard Oil Company of California, Mr. Simonsen? A. Yes, sir.

Q. How long have you been in their employ?

A. Approximately 27 years, sir.

Q. What is your present position with the company?

A. Marine superintendent of the Northern Division.

Q. Where are you located?

A. Our office is located at Point Wells, Washington. 15 miles north of Seattle.

Q. How long have you been located at Point Wells?

A. Our office has been located there since about 1931.

The Court: How long have you been there?

The Witness: Since 1931 at Point Wells.

(Testimony of L. Simonsen)

Q. By Mr. Hall: Have you been marine superintendent there all that time? A. Yes, sir.

Q. Now, prior to being a marine superintendent at Point Wells, have you had any experience on tankers?

A. Yes, sir. I have had considerable experience on tankers, but answering your question, prior to that time I was also assistant marine superintendent. I was assistant marine superintendent from about 1920.

Q. Are you a licensed marine engineer? [80]

A. Yes, sir.

Q. How long have you been such?

A. I have been a licensed marine engineer approximately 30 years.

Q. Have you had practical experience on tankers as an engineer? A. Yes, sir.

Q. Now, taking up your duties as assistant marine superintendent and marine superintendent at Point Wells, will you tell us briefly and in general what those duties were?

A. Well, the duties consist of supervision of complete operations of tankers in my district; supervision of repairs; installation of pipe lines, engines, all equipment pertaining to the operations of tankers; and also all personnel increases, victualing of ships, et cetera.

Q. During the years you were assistant marine superintendent and down to the time of the present war, when a Standard Oil tanker would be taken into some shipyard in the vicinity of Seattle for repairs, would you have anything to do with the repairs?

A. All repairs were under my direct supervision.

Q. During that period of time while you have been assistant superintendent and superintendent at Point

(Testimony of L. Simonsen)

Wells, have you had anything to do with the cargo arrangement of tankers?

A. Yes, sir. Practically every ship that is loaded, I have something to do with. That is, when I am in the [81] office.

Q. You mean by that Standard Oil tankers?

A. Yes.

Q. You don't exercise any supervision over the cargo arrangement of other tankers not operated by Standard Oil Company, do you?

A. I have nothing to do with them, sir.

Q. Do you recall the time when the Egg Harbor came to the dock at Point Wells on April 23, 1943?

A. Yes, sir.

Q. Were you present at the Standard Oil marine terminal where that vessel was tied up that day?

A. I was in the office at the time, sir. No, she tied up in the morning at 5:00 o'clock. I was not.

Q. When you came there in the morning, was the vessel tied up at the dock? A. Yes, sir.

Q. Thereafter, did you meet the captain of the vessel? A. Yes, sir.

Q. Do you remember his name?

A. Captain Olsen, I believe.

Q. Did he come to your office? A. Yes.

Q. Did you have a conversation with him?

A. I passed the time of day, yes, sir.

Q. In the course of that conversation, did he say [82] anything about his crew?

A. Yes. We discussed his crew.

Q. What did he say about his crew?

A. He said his crew was very, very inefficient, very inexperienced; that he had a green crew.

(Testimony of L. Simonsen)

Q. Now, do you recall going on board the SS. Egg Harbor after contamination had been discovered at the dock headers? A. Yes, sir.

Q. Who was with you? A. Mr. Kilbourn.

Q. Was that in the evening of that first day?

A. Yes, sir. It was around about, I should say, between 5:00 and 5:30, as near as I can recall.

Q. Who did you ask for when you got on board?

A. We came aboard there. There were two men on deck and we asked for the mate. The reply was that the mate was not aboard.

Then, I asked for the second mate. I mean, I asked for the man on watch, and what mate it was, the third or second. They replied it was the second mate.

Q. Why didn't you ask for the master? Did you know he was away?

A. I knew he was ashore, yes, sir.

Q. Then you asked for the mate on watch?

A. Yes, and was told he was in his room, and we were [83] directed to his room.

Q. You went to his room? A. Yes, sir.

Q. Did you have a talk with the second mate?

A. Yes, sir.

Q. What did he say in the course of that conversation?

A. Well, starting the conversation, I said to the second mate, "I hear you are having trouble on here."

He said, "Well, I have heard that too."

I said, "What is the trouble?"

He said, "Well, I don't know. They say we are mixing the cargo, mixing products."

(Testimony of L. Simonsen)

I said, "Just as a matter of information, I have nothing to do with it, but just as a matter of information, how are you pumping this cargo out?"

He said, "I don't know."

He said, "I have nothing to do with it." He said, "I don't know the piping arrangement nor the valve setup."

I said to him, "Have you any plans that would show the piping manifold and setup of the ship?"

His reply was, "No. not that I know of, but I have a storage plan."

I said, "May we see that?" I said, "We are just aboard here to see if we can kind of figure this thing out and help you in every way we possibly can."

He said, "Well, we would be glad to have some help." [84] He showed me the plan, and it was very clear on the plan—

Q. Just a moment, not what you saw. What else did he say?

A. Well, in our discussion he mentioned—I asked about the mate. He said the mate was ashore.

Also, in our discussion he mentioned the mate had set the valves prior to going ashore and he, the second mate, didn't know how the valves were set.

Q. Did he say that the first mate had told him not to worry?

A. That's right. He said, "He told us not to worry about them, they were set."

Q. Did he say that he wasn't worrying?

A. He indicated that he was not worrying.

Q. I just want to know what he said.

A. Yes, he indicated that he was not worrying about it, about the pumping arrangement whatsoever.

(Testimony of L. Simonsen)

Q. I show you a plat, and ask you if that is the plan of the cargo piping arrangement which that second mate gave you on that occasion?

A. That is the very one, yes, sir. That is the plan.

The Court: Any objection to its admission?

Mr. Mack: No, your Honor.

The Court: It may be received.

(The document referred to was received in evidence as Libellant's Exhibit No. 8.) [85]

Q. By Mr. Hall: Did you subsequently ascertain which tanks in the vessel were carrying or had been loaded with Standard gasoline, and which tanks with diesel?

A. Yes, sir. After we got the storage plan, so far as that was concerned, I knew what tanks were carrying what.

Q. You might tell us now which tanks were supposed to have gasoline and which were supposed to have diesel.

A. Tanks 2, 3, 4, and 8—pardon me, I mean 9, were supposed to have gasoline.

The Court: What are the numbers again?

The Witness: 2, 3, 4, and 9 were supposed to have gasoline in them. Tanks 5, 6, 7, and 8 were diesel oil. Those were the cargo I put down there.

The Court: This "D/B" means?

The Witness: Diesel burner.

Q. By Mr. Hall: Now, after you talked to the second mate, did you and Mr. Kilbourn talk to anyone on the vessel on that occasion?

A. Yes, sir. After we had a little discussion there with the second mate, we asked if it would be all right to look over this manifolding setup, which he agreed to.

(Testimony of L. Simonsen)

Q. I want who else you talked to, not what you did after that, but did you talk to anybody else on that trip on board the vessel? A. Yes.

Q. Who? [86] A. The assistant pump man.

Q. Why didn't you talk to the head pump man?

A. He was not there, sir. He was also ashore.

Q. Was Mr. Kilbourn with you?

A. Yes, sir.

Q. What did the assistant pump man say?

A. I asked the assistant pump man a few questions regarding the pumping arrangement, the seating of the valves and so forth, and his reply was that he didn't know anything about the seating of the valves. The valves were set, according to him, by the pump man, and he was told that he didn't need to worry about it, that before they got down to the point where they would be stripping, why, he would be back aboard.

Q. And the head pump man was gone from the vessel? A. Yes, sir.

Q. Did you that day go in the pump room?

A. No, sir.

Q. Was this visit to the vessel that you and Mr. Kilbourn paid on the afternoon of the 23rd the only visit you made to the vessel that day?

A. No, sir. I had gone aboard some time in the forenoon and passed the time of day with the chief mate.

Q. That was in the forenoon? A. Yes, sir.

Q. Before discharging commenced? [87]

A. Yes, sir.

Q. Those were the only times you were on the vessel that day? A. Yes, sir.

Q. Did you go on the vessel the next day?

A. Yes, sir.

(Testimony of L. Simonsen)

Q. Was anyone with you?

A. No, sir. Well, pardon me. Mr. Kilbourn, I believe, went aboard with me. Both of us went together and just made a visit. They were at that time pumping diesel oil.

Q. Did you at any time on the 24th go into the pump room? A. Yes, sir.

Mr. Hall: If the court please, I have here a plat showing the cargo piping arrangement of the vessel which is a little bit more suitable than this black and white print.

The Court: Is there any objection to the admission?

Mr. Mack: Is that the—

Mr. Hall: This is Libelant's Exhibit A for identification in connection with the deposition of Captain Olsen, and you will recall the Captain said this was a correct plat of the piping arrangement of the vessel.

Mr. Mack: All right.

Mr. Hall: I will ask that it be received in evidence, then.

The Court: It may be so marked. [88]

(The document referred to was marked as Libelant's Exhibit No. 9, and was received in evidence.)

Q. By Mr. Hall: I show you Libelant's Exhibit 9, Mr. Simonsen, and ask you if the lower half of the sheet shows the piping arrangement in the bottom of the several tanks of the vessel numbered 1 to 9 inclusive.

A. That is correct, sir, it does.

Q. And to the left of the plat, I will ask you if the various pipes there depicted are the pipes and other facilities which are in the pump room of the vessel.

A. Yes, sir. It appears that is the setup.

(Testimony of L. Simonsen)

Q. Now, there are certain of these pipes, still speaking of the lower half of the plat, which are colored in red. I will ask you if those are the main suction pipes which draw the fluid in the tanks toward the pumps at the rear of the vessel?

A. These are the tanks that draw the fluid out of the tanks, sir (indicating).

Q. You mean the pipes—

The Witness: Yes, that draw the fluid out.

The Court: This mark here shows—

The Witness: Yes, sir, that shows suction and loading, see. You can either load through these lines or discharge through them.

Mr. Hall: We will take it a step at a time, Mr. Simonsen.

The Witness: The Judge asked me that.

Q. By Mr. Hall: I will mark one line of the main suction pipe as "A" and one main line as "B" and one main line as "C", my markings being placed in tank 8, and I will ask you what tanks line "C" is designed to suck the petroleum cargo out of?

A. Primarily line C is to suck out of tanks 1, 2, 3 and 4.

The Court: Just a moment. Do I understand that this line that he has marked sucks more than one tank?

The Witness: Yes, sir. There are various suctions. Here is this main line, sir. There is a branch suction from that line that goes to your various compartments. Tank 2 here has three compartments in it.

Q. By Mr. Hall: Take No. 2. There is a device which I will mark with the letter "D". What is that?

A. That is a suction stool, sir.

(Testimony of L. Simonsen)

Q. And that suction stool is on the bottom of the tank?

A. Very close to the bottom, probably that would be one inch from the bottom.

Q. And it is connected with the pipe that runs laterally through the several compartments of tank 2?

A. That is right, sir.

Q. Now, each tank has a port compartment, a center compartment and a starboard compartment, do they not?

A. Yes.

Q. Now, I will mark another device here with the letter "E" and ask you what that is? [90]

A. That is also a suction stool, sir.

Q. And that is in the center compartment of tank 2, is it not? A. Yes.

Q. Now, I will mark another device here with the letter "F", and ask you what that is?

A. That is also a suction stool, sir.

Q. Now, at various points on this pipe which is marked "C" there appear to be devices which look like a gentleman's bow tie. What are they?

A. They are the master valves.

Q. That master valve is a gate valve?

A. Yes.

Q. It is operated, is it not, by a stem that runs up to the deck of the vessel and there terminates in a wheel?

A. Yes.

The Court: Those valves are so that you can make each tank a separate compartment?

The Witness: Yes, sir, that is right, separate so far as the valves are concerned. You can close this side off and be pumping out here.

(Testimony of L. Simonsen)

The Court: For instance, take a compartment in 2 and 3. Through those valves, could you put gasoline in one and diesel in another and keep them from comingling?

The Witness: Not simultaneously, no, sir.

The Court: I mean, after they are in there. Is there [91] any way to load those tanks separately one from the other?

The Witness: Yes, you can load them. You can load No. 2 tank, close the valves off and load No. 3 tank.

The Court: With a different grade of oil?

The Witness: If you want to rely on your valves.

The Court: It is possible?

The Witness: Yes, sir.

Q. By Mr. Hall: Now, you notice that in each of these tanks there is what I will call a lateral pipe which connects with the stools in the three compartments of the particular tank. Is that correct?

A. Yes, sir. That is what we call the athwartship line.

Q. Now, for instance, pipe C is directly connected, is it not, with the athwartship pipe in the bottom of tanks 2, 3, and 4? A. Yes, sir.

Q. But it is not connected with the athwartship pipe in the bottom of any of the other tanks, is it?

A. Not that line alone, no, sir.

Q. Let us go to line B. Line B is connected, is it not, with the—

The Court: It is the same condition as the other end of the ship?

The Witness: Yes.

Q. By Mr. Hall: What athwartship line is B connected with directly? [92] A. 5, 6, and 7.

(Testimony of L. Simonsen)

Q. Not directly with 7, is it?

A. Yes. Pardon me, I am wrong. No, sir, with 5 and 6 directly.

Q. All right. What athwartship line is pipe A connected with? [92a]

A. 7, 8 and 9, sir.

Q. Now, there is a line of pipe, red pipe on this plat apparently connecting line B and line C. I am going to mark that connecting line of pipe with the letter "G", and ask you if that is what is called a cross-over between line B and line C?

A. That is right. That is called a cross-over. That is the normal phrase for that.

Q. Now, I am going to mark another line of pipe apparently connecting A and B with the letter "H" and ask you if that is another cross-over?

A. Yes, it is another cross-over.

Q. Now, I call your attention to the fact that in cross-over G, there are two valves close together.

A. Yes, sir.

Q. Those are the gate valves that you have described?

A. Yes.

Q. I call your attention to the fact that in cross-over H there are two more valves close together.

A. We call those "block valves."

Q. That is another pair of gate valves?

A. Yes, sir.

The Court: They work from the deck?

The Witness: Yes.

Q. By Mr. Hall: Now, I observe by this chart that these pipes which I have called A, B, and C, run back into [93] the pump room and eventually run into a facility marked as a pump. Is that correct?

(Testimony of L. Simonsen)

A. Yes, sir.

Q. Then, loading from the same pump, there is a blue line of pipe which goes toward the top of the chart and emerges apparently on the deck. Is that the discharge?

A. That is the discharge line, sir.

Q. I have marked this line on the upper half of the chart with the letter "I". Would you say that this is the discharge line discharging from the same pump that line C sucks the fluid into?

A. I will have to follow that. Offhand I would say it is right, sir. Yes, it is. That is correct.

Q. All right. I will mark another line up here on the upper half of the chart with the letter "J" and ask you if that is the discharge line that corresponds with the suction line B?

A. I will follow that down, sir, and take a look. Yes, sir, that is correct.

Q. I will mark another line on the upper half of the chart with the letter "K" and ask you if that is a discharge line which takes the fluid from the pump which sucks the fluid out of the tanks through line A?

A. Yes, that is correct.

Q. Now, I observe on the upper part of the chart these lines J, I, and K, meet blue lines running at right angles.
[94]

A. Yes, sir. Those are the discharge lines on deck.

Q. And those lines that I have been last talking about have at the ends of them the description, "Cargo oil discharge overboard"? A. Yes, sir.

Q. Both at the bottom and top?

A. Port and starboard side, yes, sir.

(Testimony of L. Simonsen)

Q. And the vessel can discharge from either side?

A. That is correct, sir.

The Court: Is that their point of discharge?

The Witness: Yes, sir.

Q. By Mr. Hall: Now, I call your attention to a red line on the suction side between lines A and B; this connecting line, however, being in the pump room, and I will designate it by the letter "L" and ask you if that is another cross-over line between line A and line B?

A. That is another cross-over line between A and B.

Q. That is in the pump room?

A. Yes, sir.

Q. I will call your attention to another line in the pump room between line B and line C. I will give it the letter "M" and ask you if that is another cross-over between line B and line C in the pump room?

A. Yes, sir, that is also another cross-over between B and C in the pump room.

Q. Now, I call your attention to certain lines in the [95] pump room on the discharge side, and I will designate one by the letter "N" and ask you if that is another cross-over between lines K and J on the discharge side?

A. Between K and I, I believe, sir. I believe that is between K and I.

Q. Anyway, they are cross-overs?

A. Yes, sir, cross-over lines between K and I, yes, sir.

Q. Not between K and I?

A. Isn't that I? I am sorry, no, that is J. You are right.

Q. Then the line marked N is a cross-over on the discharge side between the lines K and J?

A. That is right.

(Testimony of L. Simonsen)

Q. Now, I will mark another line here with the letter "O" and ask you if that is another cross-over on the discharge side?

A. That is also another cross-over between J and I.

Q. Now, on the cross-over which has been marked N, there is a regular valve gate there, isn't there?

A. There are two, sir, two valves.

Q. And also another valve which by reference to the legend on the chart is called "gate valve with spectacle flange." Do you notice that? A. Yes.

Q. I call your attention to the cross-over which has been marked "O" and you will notice the regular valve and also [96] one of these valves which is designated as a gate valve with spectacle flange. You notice that?

A. Yes, sir. That's right, sir.

Mr. Hall: May I have this model marked for identification?

(The model referred to was marked as Libelant's Exhibit No. 10, for identification.)

Q. By Mr. Hall: I show you a device, Mr. Simonsen, which has been marked for identification as Libelant's Exhibit 10, and ask you if that is a model of a gauge of a spectacle flange?

A. That is definitely a model of a spectacle flange, yes, sir.

Q. I will ask you if the device takes its name from the blank which is inserted in the slot between the flanges of the pipe, as resembling somewhat a spectacle?

A. I can't answer that for sure. We have always termed it a spectacle. I presume it is because of the way it is made. There is a blank and an open space, sir.

(Testimony of L. Simonsen)

One side is open and the other side in blind. This is called a spectacle.

Q. Now, I have taken off the nuts and bolts on this model, and I have taken out a piece shaped somewhat like the letter 8.

The Court: The fact is that when they want it open, they have it one way, and when they want it closed, they have [97] it the other way, don't they?

The Witness: That is right, sir. Now it is in the closed position and no product can go between.

Q. By Mr. Hall: Now, this particular model has only four bolts and nuts on it. As a matter of fact, on the larger pipe there would be more bolts and nuts?

A. Yes, sir.

Q. Now, in this model there is a piece of cardboard on either side of the central blocking device. Does that have any counterpart in the original as it would appear in the vessel?

A. Yes, sir, very much. There is a gasket on each side. You have got a product on this side and one on this side, and you would have to have a protection to keep the liquid from getting into other tanks and a possible chance of contamination.

Q. Now, on this plat which is marked Libellant's Exhibit 9, in the lower half of the sheet there are shown some yellow lines, and I notice on here they are marked "6 strip suction." What are those yellow lines?

A. All stripper lines.

Q. Are those stripper lines suction lines?

A. Yes, sir. They are suction lines only, as I understand the plan.

(Testimony of L. Simonsen)

Q. Now, what is the necessity for having stripper suction lines in addition to the regular 12-inch suction lines [98] which on this plat are shown as A, B, and C?

A. Well, sir, stripping lines depend usually on the type of pumps that you have. This ship here, as I understand, and in fact I seen with my own eyes, is equipped with centrifugal pumps. They are not a good pump for stripping. So, in addition to their main suction lines, they put in a stripping line throughout the whole ship, which is a smaller line, as you will notice.

Q. Isn't the stripping line for the purpose of sucking out residue in the bottom of the tank that wouldn't be pumped out by the main line?

The Court: It is the same principle as milking a cow?

The Witness: It is a different type of pump.

The Court: That is a pump to get the residue and milk her dry?

Q. By Mr. Hall: They can't do it with a milking machine, so they do it by hand? A. Yes.

Q. Now, where the line A will go through the wall of the tank, about how far above the bottom of the tank will that line pass through the wall of the tank?

A. That varies, sir.

Q. I am speaking now of this particular ship.

A. Well, it would only be a guess because I have never been on one of these ships, but I would guess—

The Court: Let us not have any guesswork, then.
[99]

Q. By Mr. Hall: These stripping lines and these suction lines marked A, B, and C, however, are all on the bottom of the tanks, are they not?

A. No, sir, not exactly on the bottom. They run above the floors, what we call the floors. It depends on

(Testimony of L. Simonsen)

the construction of the ship. This ship is an Edgerwald design and has long floors which run fore and aft. This suction line, as I understand it, would probably be six or eight feet, and then this branch suction would run from there to the individual compartments.

Q. Designated as D?

A. As I understand it, this main line goes fore and aft maybe six or eight feet above the bottom of the tank proper. Then, you have your athwartship branch suction that goes into the athwartship compartments with drop lines and a stool that goes down within an inch of the bottom of the tank located fairly close, in fact as close as possible, to the after bulkhead in each compartment in order to get as much product out of the tank as possible.

The Court: Without the use of or having to use the stripper line?

The Witness: Well, that is right, yes, sir.

The Court: May I ask a question?

We are talking about what you call this model flange over here?

Mr. Hall: A spectacle flange. [100]

The Court: A spectacle flange. That is used for the purpose of shutting one tank off from the other?

The Witness: That is right.

The Court: And the only time they can change those is when the vessel is empty?

The Witness: Yes, sir, down in the hold.

The Court: Down in the gas tank?

The Witness: Yes.

Q. By Mr. Hall: Now, Mr. Simonsen, when you went down in the engine room of the Egg Harbor—

A. Pardon me, sir. I didn't go down in the engine room.

(Testimony of L. Simonsen)

Q. I mean the pump room of the Egg Harbor on the 24th of April, did you notice whether there were any spectacle flanges with spectacle blanks in them in the cross-overs which are marked here as N and O?

A. I observed that they were provided with spectacle flanges as shown on this plan, but they were installed in the open position. In other words, they had the blind section out so that products could go from one side to the other.

Q. Based on your experience, will you tell us what in your opinion should have been done on board the Egg Harbor to prevent one product from contaminating the other?

A. Well, we start on the suction lines B and C. We will go to the cross-over G. Before we would put, or before I would put unlike products like in tank 6 and tank 3, we [101] provide a definite blind in this cross-over. That is with a spectacle. We would provide a spectacle flange there.

Q. And you would seat it in a closed position so that there would be no chance for oil or products to go from the B line to the C line?

The Court: In other words, is this the flange here?

The Witness: This is the line, sir.

The Court: Where would the spectacle flange be put?

The Witness: We would put it in right here.

The Court: What are these?

The Witness: Manually operated valves, operated with extension rods from the deck.

The Court: I know, but they can be shut off?

The Witness: From the deck, sir, yes, sir.

The Court: So that no oil could pass through?

(Testimony of L. Simonsen)

The Witness: If they are tight.

The Court: If they are tight?

The Witness: Yes, sir.

The Court: It has to be tight or it would leak?

The Witness: Yes.

Q. By Mr. Hall: Then, in order to make the cross-over which is marked G safe, as I understand you, you would install a spectacle blank in the pipe G between the two valves. Is that correct?

A. Yes, sir, and fit it in a closed position, install it in a closed position. [102]

Q. To do that you would have, there being no flanges for the reception of a blank position, you would have to take out a piece of pipe, wouldn't you, and make it adaptable for the blank in the spectacle?

The Court: You would have to do some plumbing?

The Witness: You would have to do some plumbing, yes, but looking at this manifold right here, the way it is set up, it looks like you might put a blind in there without taking out any pipe. In other words, you could change the bolt holes a little bit to change the blind.

The Court: As I understand your testimony, it is your opinion that these valves are insufficient to properly block off one tank from the other and the spectacle flange should be inserted there?

The Witness: You are absolutely correct, sir.

The Court: And on the other hand, if these valves are working properly they would serve the same purpose, would they not? There is a double check? In other words, there are two valves there, are there not?

The Witness: Yes, sir.

(Testimony of L. Simonsen)

The Court: And that would act as a double protection? You would not only rely on one valve, but under your construction, you could rely on two valves?

The Witness: That is right, if they are tight.

The Court: Well, if the spectacle is not tight, you are in trouble, too, aren't you? [103]

The Witness: Well, it would have to go through metal, sir.

The Court: I know, but if these are tight, it has to go through metal too?

The Witness: That is right.

The Court: So, is is your opinion that the construction of the vessel is such that it would be unsafe for the carrying of two grades of petroleum products?

The Witness: Yes, sir, with that setup, yes, sir. Unlike products, you see, like gas here and diesel over here.

The Court: Yes.

Q. By Mr. Hall: Now, will you explain why, from your experience, you consider it unsafe to handle different products relying simply upon those two valves?

A. Dirt gets under the seats. They won't seat properly. The threads wouldn't bear on the valve. You may put a wrench on it and put all the leverage two men could put on it, and you think it is closed, but these, you understand, sir, are down in the tank. They are in the products. You have no lubrication and these valves work quite hard. So, for that reason anything might get under them.

You might test those valves today and load through them tomorrow, and a spring from your pump or a spring from any debris might get underneath those valves and

(Testimony of L. Simonsen)

they could not be closed tightly. You cannot rely on valves.

Q. Now, Mr. Simonsen, I call your attention to the fact [104] that in the cross-overs L and M, for example, it is shown on this chart that those cross-overs are equipped with spectacle flanges. Is there any greater danger from contamination through cross-overs L and M than through cross-overs G and H? A. No, sir.

Q. So that I understand you correctly, if each one of cross-overs L and M are equipped with spectacle flanges, cross-overs G and H should be so equipped?

A. Your deduction is definitely correct.

Q. What else would you have done besides installing spectacle flanges in the cross-over G?

The Court: You wouldn't have changed the name of the ship, would you?

The Witness: No, sir. We would also have installed spectacles in the cross-over between lines A and B.

Q. By Mr. Hall: That is the cross-over marked H?

A. Yes, H.

Q. What else would you have done?

A. Then, we also would have set the spectacles in the cross-overs M and L in a closed position, spectacles N and O in the cross-overs in a closed position.

The Court: Which ones were found open, N and L?

The Witness: Yes, sir.

Mr. Hall: I might say, your Honor, that the deposition of the master will show that they were not using any of the closed positions on these spectacles anywhere on the vessel. [105] Everything was open.

The Court: I see. Where are those open spectacles?

The Witness: I observed O and N to be open.

(Testimony of L. Simonsen)

Mr. Hall: The master says they were all open.

The Court: All right.

Q. By Mr. Hall: What is a hydrostatic test?

A. A test of water on new construction or any new work done in a pipe line.

The Court: At this time, we will take a short recess.

(Short recess.)

The Court: I would like to ask a couple of questions.

These flanges here, O and N, were those the flanges that you said you found open?

The Witness: Between N and O. The cross-over here on O, and the cross-over here on N.

The Court: These two lines here marked 1 and 2, just for our information, these are the flanges, are they not?

The Witness: The spectacles, yes, sir.

The Court: Or spectacles?

The Witness: Yes, sir.

Mr. Hall: I can mark this O-1.

The Court: Now, those were the two flanges that you found open?

The Witness: Yes, sir.

The Court: Now what effect would that have in the pumping of oil, in pumping the cargo out, with having those open? [106]

The Witness: The point is this, sir—

The Court: In other words, would the effect of having those open cause a commingling in the pumping out?

The Witness: If these valves were not tight?

The Court: If the valves O and N are not tight, then that would cause—

The Witness: The intermingling, yes, sir.

(Testimony of L. Simonsen)

The Court: Then, if those valves were tight, it wouldn't cause the intermingling?

The Witness: No, sir, if they were tight.

Q. By Mr. Hall: When you speak of the spectacle flanges in the closed position, you mean, do you not, with the blank piece of pipe completely blocking the pipe?

A. Yes, sir.

Q. Would you proceed with your description of what is done in the case of a hydrostatic test?

Mr. Mack: Do you want to offer this exhibit in the case?

Mr. Hall: Yes.

The Court: I think it should go in evidence as explanatory of the witness' testimony.

Mr. Hall: Very well. I will ask that the model which is marked Exhibit 10 for identification be received in evidence.

The Court: It may be received.

(The model referred to was marked as Libellant's Exhibit No. 10, and was received in evidence.)

Q. By Mr. Hall: Would you proceed with your description [107] of what is done, briefly now, when a hydrostatic test of cargo lines is made?

A. As I started out to say, on all new installations, any changes in pipe lines or periodic overhauls of any kind, before a ship is put back into commission, we make a hydrostatic test of all lines, suction lines, discharge lines, by-pass lines, cross-overs, stripping lines, et cetera.

Q. What is the purpose of that test?

A. To determine whether there are any leaks.

Q. You mean by leaks, leaks in the valves and cross-overs?

(Testimony of L. Simonsen)

A. Yes, and expansion joints or leaks in the line any place, sir.

Q. Then, if I understand you correctly, water is pumped in the line and more pressure is forced against a closed valve. Is that what is done in this test?

A. That is right, sir. Normally the suction lines are tested to 50 pounds. I mean all these lines, all these lines suction to the pump. The discharge lines we test to 125 pounds.

The procedure, for instance, on this line would be to fill the whole line to the very top, at the very top of the manifold of the discharge header; place in a 50-pound test on the line to give all the suction branches, and we would start in, say, at No. 1 tank, and go right down the line on all our blocks, master valves, and so forth. [108]

When that is determined tight, then we shut off the loading drops and test the discharge side down to the pumps at 125 pounds, and all of this is proved tight before the vessel is permitted to load a cargo.

Q. Well, now, I want you to assume these facts, which I believe will have a basis in the evidence in this case. Assume that this vessel, the Egg Harbor, was delivered by the buildings on the 10th of April, 1943; that thereupon, the vessel was loaded with water ballast and proceeded from Portland, Oregon, to San Pedro, California; that it took on at San Pedro, California, a cargo of diesel in tanks 5, 6, 7 and 8, and then proceeded to El Segundo and took on a cargo of gasoline, which was placed in tanks 2, 3, 4 and 9; that cargo of gasoline and that cargo of diesel being the cargo involved in this case.

My question to you now is this, Mr. Simonsen. Would you in the case of that vessel before that cargo was loaded

(Testimony of L. Simonsen)

at San Pedro and El Segundo, make one of these hydrostatic tests irrespective of what tests may have been made before the vessel left the hands of the builders on April 10th?

A. The test that I would definitely make if I would ever load that kind of a cargo in this ship at that time would be before loading to test the valve in the cross-overs. My purpose in that would be to isolate, definitely isolate line C. for instance, so that there would be no possible chance for any contamination into line B through this cross-over. [109]

They have a very bad situation—

Q. Would you also test in the same way the other cross-over from A to B?

A. That is what I was coming to now. They have got a very bad situation here, the way this cargo is loaded. I would also put a test on the cross-over at H between A and B to determine it tight. I wouldn't like to make the load, though, sir. I wouldn't like to make that kind of a load.

Q. Then, if I understand you correctly up to the present time, you would make a hydrostatic test of the cross-over which is indicated in this chart as H and also a hydrostatic test of the valve in the cross-over on G?

A. Yes.

Q. Is that right? A. Yes.

The Court: Do I understand that before each loading of a tanker it is good practice to make those tests?

The Witness: Well, I will tell you, sir, as I mentioned before—

The Court: You can answer that. Is that common practice? Is it good practice?

(Testimony of L. Simonsen) .

The Witness: It is good practice. It would be naturally good practice and we wouldn't do it any other way if we had this kind of a setup in our manifolding. We wouldn't load this kind of a cargo without spectacles in there, sir.

The Court: So far as the valves are concerned, if they [110] were not tight, or if somebody manipulated them, that would cause the intermingling?

The Witness: Yes, sir.

The Court: In other words, as I understand your testimony you, of course, do not approve of this method of shutting off one tank from the other?

The Witness: Definitely not, sir.

The Court: And in the event of using this form of valve, you would test those valves each time before loading?

The Witness: Yes, sir, if we were going to put a different product on each side, sir.

Mr. Hall: That is all my direct examination of this witness, if the court please.

I have in the court room Mr. Dobler, who is connected with the Texas Company, a marine superintendent. He has a tanker under repair that he has to watch, and I would greatly appreciate it if this witness might be withdrawn and I might put Mr. Dobler on. I don't think it would take very long.

The Court: That is all right. Is it satisfactory with you?

Mr. Mack: That is satisfactory with me, your Honor.

(Witness temporarily excused.) [111]

DANIEL DOBLER,

called as a witness by and on behalf of the libelant, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Daniel Dobler.

Direct Examination

By Mr. Hall:

Q. What is your present position, Mr. Dobler?

A. Superintendent of marine operations for the Texas Company of the Pacific Coast.

Q. Your headquarters are in Wilmington, California?

A. Yes.

Q. How long have you been with the Texas Company?

A. Almost 18 years.

Q. What are your duties as marine superintendent with that company? What have they been?

A. To supervise the loading of ships, the repairing of ships, manning and in general supervision of all activities.

Q. You had charge of the loading and discharging of tankers?

A. Yes, sir, I do.

Q. You also had charge of the repair of tankers?

A. Yes, sir, I do.

Q. You also have had charge of the arrangement of separate cargoes in the same tanker?

A. Yes, sir, I do. [112]

Q. How many tankers have you had under your supervision as belonging to the Texas Company, for example, of late years?

A. Well, it averaged about six.

Q. Now, I show you Libelant's Exhibit 9 in this case, which is a plat showing the cargo piping in a so-called

(Testimony of Daniel Dobler)

T-2 tanker, and I want you to assume that this tanker was carrying gasoline in tanks 2, 3, 4, and 9, and that it was carrying diesel furnace oil in tanks 5, 6, 7 and 8.

My question to you now, is this: What would you have done, or what in your opinion should have been done, basing your opinion upon your experience, to prevent a commingling of the products in the tanker?

A. Well, I would always put in the blind joints to insure that there would be no contamination of cargo. That is a standing order in our company.

Q. By the words "blind joints," do you mean the blind part of the inside of the spectacle as illustrated in Libellant's Exhibit 10?

A. Yes, sir.

Q. Go ahead. Where would you put in those spectacle flanges?

A. I would do that in the pump room.

Q. You would do that in the pump room.

A. Yes, sir.

Q. In the cross-overs in the pump room? [113]

A. Yes, sir, in the cross-overs in the pump room.

Q. You mean by that the cross-overs which are marked on this plat L and M, and O and N?

A. That is right, yes, sir.

The Court: Would that prevent commingling by putting them in those places under that piping system?

The Witness: Yes, that would.

Q. By Mr. Hall: I call your attention to the fact that there is a cross-over between cargo lines at H and another cross-over at G. Would you put in blank spectacles in those cross-overs?

A. I would feel safer with them in.

The Court: Would you say that is good practice?

The Witness: That is positive practice.

(Testimony of Daniel Dobler)

The Court: Why?

The Witness: Well, you are doubly sure then that in the event either one of those valves would leak, why, you would still have no contamination.

The Court: Both of them would have to leak before there would be any contamination?

The Witness: There might be a possibility that there might be a foreign object under this line that may swerve this valve or this one, or both.

The Court: It has to swerve? Something would have to go wrong with both valves in order to cause a comingling?

The Witness: That is true. [114]

Q. By Mr. Hall: In your experience, Mr. Dobler, have you known of instances where a foreign object prevented the tight closing of those valves?

A. Yes, that has been my experience.

Mr. Hall: Take the witness.

Cross-Examination

By Mr. Mack:

Q. Mr. Dobler, did I understand you to say it was positive practice to put in spectacles way down in the bottom of the ship there in what they call the No. 5 cross-over and No. 7 cross-over?

A. I would do it to protect myself on that.

Q. Now, the No. 5 cross-over, as I understand it, is marked G on this plat here, Libellant's Exhibit 9, and the No. 7 cross-over is marked H. Is that right?

A. Yes.

Q. Well, now, just to get a picture of those things, the actual valves themselves are way down in the ship, aren't they, Mr. Dobler, way down in the tanks?

(Testimony of Daniel Dobler)

A. They are.

Q. Are you familiar with a Swan Island tanker as to the depth of the tanks?

A. Well, I can't give you the exact depth. I know they are deep.

Q. It is somewhere around 38 feet?

A. Somewhere around there, I should judge. [115]

Q. Now, even though the vessel was constructed that way and delivered after tests, you would put in spectacles in the 5 and 7 cross-overs?

A. I would put the spectacles in the pump room as required to isolate the cargo.

Q. Well, we are not talking about the pump room right now. We are talking about the No. 5 and 7 cross-overs in the bottom of the ship.

A. Well, in this case, I would depend on these two valves here, although I would feel better with the joint in the line.

Q. But isn't it customary and quite usual as a matter of fact, to rely on straight cross-overs Nos. 5 and 7 without any spectacles?

A. Some do, yes.

Q. For instance, don't you have a tanker called the "Shenandoah"?

A. Yes, sir.

Q. Did you outfit that tanker with spectacles down in Nos. 5 and 7 cross-overs?

A. We isolate those lines from the upper deck.

Q. But that is via the pump room, isn't it?

A. In the pump room, yes.

Q. And you rely on the valves, for instance, in the Shenandoah so far as the No. 5 and No. 7 cross-overs are concerned for carrying different grades of cargo?

[116]

(Testimony of Daniel Dobler)

A. If it is dissimilar cargo like diesel and gasoline, we blind them off. We don't depend on the valves.

Q. Have those been changed by you to be able to blind them off?

A. Well, they always have been arranged after that manner.

Mr. Hall: Pardon me, Mr. Mack. You mean blind off the spectacle device?

Mr. Mack: Yes.

The Witness: Pardon me.

Q. By Mr. Mack: On the Shenandoah, for instance, do you have the spectacle arrangement in the Nos. 5 and 7 cross-overs in the bottom of the ship?

A. No. That is all on the upper deck.

Q. That is handled by wheel valves, isn't it?

A. No. We take out a 12-inch nipple on deck and blind-off both those pipe connections.

Q. But you don't do anything to the valve down below?

A. Well, all the valves are in the pump room anyhow.

Q. The point is the Shendandoah is a lot different type of tanker from the Swan Island tankers?

A. Absolutely different.

Q. I see.

The Court: But anyway, you do it from the deck? It has the same effect as using one of these spectacles?

The Witness: Precisely the same. [117]

The Court: Except that you have a different method of doing it?

The Witness: The only thing, we take out a 12-inch section of line and then blank each flange that completely isolates that line from the general loading headers.

(Testimony of Daniel Dobler)

Q. By Mr. Mack: But that is up on top, and not down in the ship? A. That is up on deck.

The Court: So that it has the same effect as if you blinded off these—

The Witness: As if these in the pump room were blinded off here. With the Shenandoah, all her pipe lines are on deck, and all suction valves for each tanker are in the pump room.

Q. By Mr. Mack: So that you can get at them?

A. Yes, we can get at them.

Q. And it would not be unusual in this type of tanker, would it, to rely on the Nos. 5 and 7 cross-over valves completely?

A. Well, in most cases most of the operators, I presume, would.

The Court: Is that good practice or bad practice, in your opinion?

The Witness: Well, there is always the danger of contamination, even with a double valve.

Q. By Mr. Mack: Now, let me ask you this, Mr. Dobler. [118] If, and we will assume for the sake of illustration that you blanked off, you went down in the bottom of the ship and went to a lot of trouble and work and fixed up Nos. 5 and 7 cross-overs so that you could blank them off, would you not then sacrifice a certain amount of maneuverability of your cargo?

A. Will you repeat that once again, please?

Q. Yes. Let us suppose, for instance, that you went to the trouble and time and expense of going down in the bottom of the ship and doing whatever was necessary to put spectacles in the No. 5 cross-over marked G, and the No. 7 cross-over marked H, and you had those set with a

(Testimony of Daniel Dobler)

cargo. Then, would you not sacrifice maneuverability of the cargo and that sort of thing?

A. Well, once you had them blanked off and you were going to pump out those particular cargoes in a certain out port, what difference would it make?

Q. Well, let me ask you—

The Court: It would make it difficult to shift the cargo.

Mr. Mack: That is one point.

The Witness: Well, you wouldn't shift the cargo. If you had diesel there, you wouldn't shift it back into the gasoline.

Q. By Mr. Mack: Yes, but from port wing to star-board wing, or from one center tank to another wing tank, you [119] couldn't do it, could you?

A. Well, you wouldn't do any shifting along that line. You would leave the cargo in there until you pumped it out.

Q. Well, what I have in mind is that sometimes ships are subject to sudden lists and that sort of thing and you have to shift the cargo occasionally.

A. I have never had to shift the cargo.

Q. You haven't run into that? A. No, sir.

Q. Then, supposing that you had your Nos. 5 and 7 blanked off; then, with this line here marked C, if something happened to that line C, you couldn't get your cargo out of tanks 2, 3, 4 and 5, could you, or Nos. 2, 3 and 4?

A. Will you repeat that once again, please?

Q. Well, now, this line here C runs to tanks 1, 2, 3, and 4? A. That is correct.

(Testimony of Daniel Dobler)

Q. If everything was blanked off and this pump broke on line C, you could not get your cargo out of there until the pump was fixed, could you?

A. Possibly not, no.

Q. But, if you did not have Nos. 5 and 7 cross-overs blanked off, could you not pump out tanks 5 and 6 and then run 1, 2, 3, and 4 through that cross-over?

A. Through this cross-over here?

Q. Yes. [120] A. Yes, that could be done.

Q. So that if you blanked off those cross-overs you couldn't do that?

A. This is a line running through here. If this line was broken down, there would be no way of pumping out here only through here (indicating).

Q. Mr. Dobler, just so we are perfectly clear on this, if the No. 5 cross-over were blanked off, and the No. 7 cross-over was blanked off, and the pump on line C broke for tanks 1, 2, 3, and 4, you could not empty those tanks, could you, until the pump was fixed again?

A. That is correct.

Q. But, if you didn't have the cross-overs at 5 and 7 blanked off, you could empty at least tanks 5 and 6 and then, through that line, empty tanks 1, 2, 3, and 4, couldn't you?

A. That is correct. In fact, I would not load a ship the way this one was loaded.

The Court: What do you mean by that answer?

The Witness: I would concentrate the diesel in one end of the ship, and the gasoline away from it.

The Court: Why would you do that?

The Witness: Because there would be less opportunity for contamination.

(Testimony of Daniel Dobler)

Q. By Mr. Mack: Mr. Dobler, is your company carrying different grades of cargo at the present time?

A. We are, four to five different grades. [121]

Q. You are carrying maybe gasoline, diesel oil and crude all in one tanker?

A. No. We will carry stove oil, diesel oil, two grades of gasoline. We also carry or used to carry lubricating oil in connection with kesosene.

Q. That is a common practice among the tanker fraternity, isn't it?

A. It is.

Q. Now, if I understand you correctly, if you were loading this cargo, you would load four tanks of diesel and then four tanks of gasoline?

A. I would try to hold the diesel as much together as I possibly could, keeping in mind the trim of the ship.

The Court: Is there any difference in the weight?

The Witness: There is a difference in the weight. Diesel is heavier than gasoline.

Q. By Mr. Mack: So that on this vessel, assuming that the diesel was loaded in tanks 5, 6, 7 and 8, that is pretty much along the middle of the ship, isn't it?

A. That is the center of the ship.

Q. So, you have your heavier liquid all towards the center?

A. (No response.)

The Court: That is true, isn't it?

The Witness: Yes, that is true.

Q. By Mr. Mack: Then, wouldn't you say this vessel [122] was loaded properly?

A. Well, that would be in the minds of some masters, yes, it would be loaded properly, but we try to keep the diesel as far aft as we possibly can toward the pump room or adjacent to the pump room to avoid contamination as much as we possibly can.

(Testimony of Daniel Dobler)

The Court: What is the danger? Is there much danger in these cargoes of contamination? Is that something you are constantly on the lookout for?

The Witness: All the time. On every cargo composed of two or three commodities, we are very watchful on the contamination. Samples are taken and checked after loading, and they are checked before discharging.

The Court: Well, in loading a vessel of this type, would you make any test to ascertain whether or not the piping was secure?

The Witness: Were I to assume charge of this vessel, presuming she is a new vessel, to satisfy myself, I would apply 100-pound tests on all the line valves and whatnot to satisfy myself that the lines were tight and that the valves were tight.

The Court: Before loading?

The Witness: Before loading, yes, sir.

The Court: Do you know whether that is a practice in the fraternity, as I believe it is called, the tanker fraternity? [123]

The Witness: Well, I have handled a lot of it myself.

The Court: You don't know whether anybody else has or not?

The Witness: Yes. It is common practice in the oil group to test their pipe lines every so often, possibly every trip, if they have doubts.

The Court: Well, you would expect a new ship to be tight, wouldn't you?

The Witness: Yes, you would. In line with good workmanship everything should be tight, but there is that possibility that rags may have been left in the line, and there may have been bolts left in the line, and while they

(Testimony of Daniel Dobler)

may lie dormant in one position, they might also move in another and possibly come under a valve, or a bolt may shift under the valve. That has been common experience with myself.

The Court: Do you test any different on a new ship than on one that has been in service? In other words, assuming your ship was a new ship, as you have assumed, you say you would test it under 100-pound pressure. Would you be any more careful in your testing for a new ship than you would one that had been in the service for awhile?

The Witness: Yes. I can remember of one new ship that came out of the builder's yard, people that were famed for their workmanship, and when it arrived, all the valves had to be taken out and remachined to be tight.

Q. By Mr. Mack: Mr. Dobler, if you assume that the [124] particular ship involved here is loaded with diesel at San Pedro and then went around to El Segundo to pick up gasoline, would you say that the ship was properly trimmed, having the diesel in the tanks 5, 6, 7 and 8?

A. Well, it would give her more of a level trim.

Q. And if it were the fact, Mr. Dobler, that before loading any petroleum products whatever all lines in this particular ship were subjected to 125-pound water test and there were no leaks whatever, would you say that the vessel was subject to being loaded?

A. Well, now, where would you make that test, in the shipyard or just before she started to load?

Q. Assume that the vessel made a trip brand-new in ballast and while at sea, just before coming into port, water tests were made on all cargo lines and pipe lines

(Testimony of Daniel Dobler)

at 125-pound pressure, and there were no leaks. Would you say that was good practice and that it would be in good order to load the ship?

The Court: Without further tests?

Q. By Mr. Mack: Without further tests?

A. Speaking of present day crews, I certainly would like to see the test myself.

Q. Well, we assume that you don't have to see it. You are assuming it was done.

A. Well, in that case I would have to take the captain's and the mate's remarks that it was bona fide and [125] the lines were tight.

The Court: How could they determine that they were tight if the tanks were loaded with ballast?

The Witness: Well, you would test the lines when the ship was empty, or, you could still have your ballast in certain tanks and test through the empty tanks, and at the time you pump out, you could test the lines in the remainder of the tanks.

Mr. Mack: I think the fact is, if the court please, they pump all the ballast except one tank out and make the water test, and then make the last water test in the final tank when they pump it out. That will show from Captain Olsen's deposition.

Re-Direct Examination

By Mr. Hall:

Q. You were asked, Mr. Dobler, if the cross-over G were blanked off, whether it would be possible to remove the cargo from tanks 2, 3 and 4 if the pump pertaining to line C broke, and I think you said it would not be.

A. That is presuming it broke in here?

(Testimony of Daniel Dobler)

Q. No. A. The pump broke down?

Q. Yes. Wasn't that the question? A. Yes.

Q. And you said you could not remove—

A. Well, you can pump through this line. [126]

Q. Wouldn't it be entirely possible?

A. You could pump through this line here.

Q. Well, to get it in the record, assuming that that pump pertaining to line C broke down, and you had permanently blanked cross-over at G, wouldn't it be entirely possible to remove the contents of tanks 2, 3 and 4 through the cross-over M by means of the pump pertaining to line B? A. That could be done, yes, sir.

Q. Now, if the vessel should load four tanks of diesel at San Pedro, wherever that diesel was accommodated it would be perfectly possible, would it not, to put water ballast in the remaining tanks for the purpose of the voyage up to El Segundo?

A. It could be done, yes, sir.

The Court: As I understand it, the way you suggest loading is to have the diesel tanks in one group, and the gasoline tanks in another group, as a precautionary measure?

The Witness: Yes, sir. I can illustrate, if the court may allow me, where we load a ship at our terminal where the master insists on loading the underneath tanks with gasoline and the other tanks with kerosene. For instance, No. 1 with gasoline, No. 2 with kerosene, No. 3 with gasoline, No. 4 with kerosene, and so on until it is completed.

We proposed to him that he load the kerosene in one end of the ship with a certain amount forward in his smaller tanks, and he disagreed with us and the result was

(Testimony of Daniel Dobler)

[127] contamination of the entire cargo by such manner of loading.

The Court: Well, how was it contaminated?

The Witness: Well, it was partially contaminated. It was contaminated through the suction lines as well as through the vent lines.

Mr. Mack: Was that a Swan Island tanker?

The Witness: No, sir, it was a foreign tanker.

Q. By Mr. Hall: Have you been advised by the War Shipping Administration, Mr. Dobler, that spectacle flanges were recommended in the case of tankers carrying different products?

A. Yes, sir. Here is a communication from my New York office signed by Mr. Buchanan, our general marine manager, calling attention to that.

Mr. Mack: That is dated, though, isn't it, December 14, 1944? That document you have just referred to, Mr. Dobler, is dated December 14, 1944?

The Court: It will speak for itself, will it not?

Mr. Mack: This happened back in April of 1943.

The Court: It may indicate they are finally catching up with themselves. They probably have had some other trouble like this. I don't know why it is, with all the shipments of oil where they must have had any amount of commingling, that the law books are practically devoid of cases involving a situation such as we have here. At least we haven't been able to find any. [128]

Mr. Hall: If the court please, I offer this document which the witness has produced with reference to spectacle flanges.

(Testimony of Daniel Dobler)

The Court: Any objection?

Mr. Mack: Yes, on the ground it is remote and immaterial.

The Court: Well, I don't see where a letter from his general manager to him would be admissible unless it is consented to.

Mr. Hall: Well, if the court please, I am not particular about the letter, but the letter attaches and transmits to Mr. Dobler a War Shipping Administration circular No. 27. It is called "Tanker Operations Circular No. 27." It is put out by the Tanker Operations Division of the War Shipping Administration. I think it would be something the court could take judicial notice of.

The Court: We will mark it for identification in this case.

Mr. Hall: Then, Mr. Mack, if you have no objection, I will take just the circular and mark that.

Mr. Mack: Is that War Shipping Administration Circular No. 27?

Mr. Hall: Yes.

The Court: Any objection to that?

Mr. Mack: I will object on the same ground that it is remote and immaterial, being dated December 14, 1944.

The Court: It may be marked for identification.
[129]

(The document referred to was marked as Libellant's Exhibit No. 11, for identification.)

Mr. Hall: That is all, Mr. Dobler.

(Witness excused.)

L. SIMONSEN

resumed the stand as a witness by and on behalf of the Libelant, and, having been previously duly sworn, was examined and testified further as follows:

Cross Examination

By Mr. Mack:

Q. Mr. Simonsen, I believe that you and Mr. Kilbourn went on board the Egg Harbor around 5:00 or 5:30 in the evening of April 23, 1943. Is that right?

A. Yes, sir.

Q. When you were there, you talked to the mate on watch. Is that right?

A. That is right, sir.

Q. Was he the second mate, do you know?

A. He was the second mate, sir.

Q. And it is customary, is it not, in fact it is practice that there be a mate on watch at all times?

A. That is right.

Q. And the mates take turns on the watches, do they not?

A. That is right, sir. They stand watch and watch.

Q. So that when the second mate is on watch, he is in [130] charge of the ship?

A. That is right, sir.

Q. And it is quite customary for the captain or other officers to be away or on other business as long as there is one of the officers on watch. Is that right?

A. That is practice, sir.

Q. Now, did you get the second mate's name, or do you recall it?

A. I do not, sir.

Q. You had some discussion with him, I believe you said.

A. Yes, sir.

Q. What was that conversation?

A. The second mate informed us that he didn't know anything about the loading of the ship, the operation of

(Testimony of L. Simonsen)

the valves, or he didn't know anything about manifolds. He was not a tanker man. He led us to believe, in fact from his conversation I could see he was not a tanker man.

Q. Well, did he tell you in so many words "Mr. Simonsen, I am not a tanker man," or is that something you assumed?

A. I don't think he told me in so many words, but he said he didn't know the pumping arrangement, the loading arrangement or the pipe lines or the valve seats.

Q. Now, at that time, the pumping was shut down, was it? A. Yes, sir. [131]

Q. And discharging was not commenced until Mr. Hicks had returned, was it?

A. I was not there when discharging commenced the second time, but that is what I understand.

Q. Now, you also talked to the assistant pump man?

A. That is right.

Q. Was that the same afternoon or when?

A. It was the same afternoon, the same evening rather, when we went on board.

Q. Right after you talked to the second mate?

A. That is right, sir, right after we talked to the second mate we talked to the pump man.

Q. Where did that take place?

A. After the midship house.

Q. Was anybody there except you and Mr. Kilbourn?

A. And the second mate.

Q. The second mate?

A. Yes, sir, and the assistant pump man.

Q. What did the assistant pump man say, if anything?

A. The assistant pump man—we asked him about the valve seatings and he said he knew nothing about them.

(Testimony of L. Simonsen)

The valves were all set, according to him, by the pump man before he left. He told him that there was nothing for him to worry about so far as the cargo was concerned, meaning the cargo itself in the tanks or the valves. His main job was to keep those pumps going, watch the pumps, watch the pressures and [132] so forth. He said he was told he would have nothing to worry about so far as discharging was concerned.

Q. Mr. Simonsen, did you have anything to do with these tests of the samples that have been related by Mr. Kilbourn? A. Not a thing, sir.

Q. You were engaged in other business, were you not, during that time?

A. I was in my own work, yes, sir.

Q. Have you ever sailed on tankers yourself?

A. Yes, sir.

Q. What licenses do you hold in the Marine?

A. I hold an unlimited chief engineer's license.

Q. When did you last sail on tankers?

A. I last sailed on a tanker as a licensed officer about 1920.

Q. That was in the early days of the tankers?

A. Tankers haven't changed any, sir.

Q. Now, this Egg Harbor is what is practically known as a Swan Island tanker, is it not? A. Yes, sir.

Q. They first started to produce those several years ago, did they not? A. That type somewhat, yes, sir.

Q. That is one of the newer types of tankers that have been evolved? [133]

A. The hull construction, yes, sir. The pipe line construction is not new.

(Testimony of L. Simonsen)

Q. Well, by that you mean that all tankers basically have stripping lines and suction lines and that sort of thing?

A. Not necessarily all stripping lines, no sir. Some of those do not have stripping lines. They use the main lines for stripping.

Q. Now, as I understand it, Mr. Simonsen, if you had been running the show here, so to speak, so far as the Egg Harbor was concerned, you would have set spectacle blanks in cross-overs designated as G and H on this plat?

A. Yes, sir. I would have provided a spectacle or closed spectacle here on cross-over G and one here on H.

Now, as I said before, I would never load the ship this way, sir. I would not load the ship this way.

Q. Well, G is what is known as a No. 5 cross-over?

A. Yes.

Q. And H is known as a No. 7 cross-over?

A. Yes, sir.

Q. Now, when you say you would never load the ship that way, what do you mean by that, sir?

A. It is not safe. It is not safe to load gasoline and any other uncommon product in adjacent tanks using the same pipe lines without a definite spectacle in there. It definitely isn't safe.

In the first place, you are relying on human nature and [134] the human element, and you are relying on your valves being tight, and you don't see them. They are down usually in 302 feet of oil, and you are depending on those seats being o. k. and not having any interference whatsoever, and it is not safe. It is definitely not safe to load gasoline on one side of the valve and diesel oil on the other side of a valve.

(Testimony of L. Simonsen)

Q. Well, isn't it reasonable in your opinion, Mr. Simonsen, to install gate valves and a pair of them for cross-overs there?

A. Not between products, not between unlike products, no sir.

Q. The reason, as I understand it, that you install two valves within a short distance of each other instead of one, is that if one may not work you have always got the other that will?

A. That is very true. We have that setup on like products. If we have two grades of diesel where a little contamination doesn't make a great deal of difference, then we rely on the double block, but we do not rely on the double block between gasoline and diesel oil because it is not safe.

The Court: What do you base that statement on?

The Witness: The unknown quality, sir, of the valve; the human element, and then the possibility of there being something under the valve.

The Court: I know, but has experience taught you that there is an element of risk of contamination wherever you [135] have a cargo of two grades of oil?

The Witness: Definitely so. Where you have got valves, definitely. We have had it happen so many times. Do you know, sir, that for 20 years we haven't loaded gasoline under my jurisdiction for over 20 years on one side and diesel on the other without a definite block in there.

Q. By Mr. Mack: Have you been using Swan Island tankers?

A. No, sir. I have not been using Swan Island tankers, but a pipe line is a pipe line and it doesn't make any

(Testimony of L. Simonsen)

difference what kind of a tanker it is. It is still a pipe line. It still takes in tanks. We have tankers with practically the same kind of setup as this.

Q. You know, do you, Mr. Simonsen, that this Swan Island tanker was passed by and accepted by the United States Maritime Commission?

A. By the United States Maritime Commission? Well, yes, I assume it was.

Q. And isn't it a fact that there are many tankers, American registered tankers, sailing the seas, that have and rely on cross-over valves down in the bottom?

A. I couldn't answer that, sir. I couldn't answer it at all. I just couldn't believe that anybody would do it.

Q. Well, now, if you were taking delivery of the tanker brand-new with the No. 5 and 7 valves as shown there, cross-overs, before accepting any cargo whatever, would you go down [136] in the bottom and change all that plumbing there and install spectacles?

A. I would go down in the bottom and definitely remove this between the valves here. I would remove that fitting and also this fitting over here. I would remove the valves and blank them because you have got the same flexibility in the pump room. Otherwise, you would be just inviting trouble. You have got the same flexibility in the pump room.

That is just like putting two gates in, one alongside of the other. It is of no use at all, because you can do it all in the pump room where you can see.

Q. You would do that, would you, even in times of stress and war?

A. I would remove them immediately before I would ever load a cargo on the ship. Under no circumstances

(Testimony of L. Simonsen)

would I load this ship with unlike products between this manifolding setup without definitely removing these fittings here and seeing that the valves or anything you put in there are blanked entirely, that those lines are blinded entirely at G and H cross-overs, so that no matter what you do on deck you could not create a contamination through the cross-overs down in the tanks. Definitely I would do that, because you have the same flexibility in the pump room.

Q. Well, now, that would involved some ship work, would it not, shipbuilding?

A. Very little. I could pick a crew and do that. I [137] could rip those things out in no time. I don't think it would involve very much.

Q. It would take a couple of days, wouldn't it?

A. No, sir. Looking at that, I believe you could rip those out, take a half a dozen men and go down there and drop those out in an hour or even less. I haven't seen the ship, but I have seen a lot of these pipe lines, and I would say that wouldn't be very much of a job.

Q. Let me ask you this, then. Assuming that you would blank off No. 5 and 7 cross-overs down in the bottom, there would be a sacrifice of some maneuverability or working of the pipe lines?

A. No, sir, definitely not, because you have the same thing in the pump room.

Q. Well, supposing your pumps broke down on line C and line A, for example, on this plat.

A. All right. We would pump that with a midship pump. We would remove those spectacles and use that midship pump. You have got your cross-overs there just the same, sir.

(Testimony of L. Simonsen)

Mr. Hall: The witness is indicating cross-overs L and M.

The Witness: Those cross-overs answer the same purpose. Cross-overs L and M answer the same purpose as the cross-overs H and G. They are on the same pipe line A. It is just like changing the same gate in the same fence right alongside each other. They are on the same pipe line. So, you can see readily that you can do just as much in the pump room as you [138] can in here.

The Court: Gentlemen, I think we will take a recess until tomorrow morning. We have had a good afternoon of it, but I would like to know, and if it is in the briefs, it had not been made clear to me, the interpretation of 1303 as you interpret it.

It says:

"(1). The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence."

Then it names (a), (b), and (c). Then there is No. (2) reading as follows:

"The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."

A great deal of attention is paid to the attention of whether or not the ship exercised due diligence. Now, under (2) it would appear to me that it places a responsibility upon the ship to properly and carefully discharge the cargo. It is not a subdivision under (1) where due diligence is required.

I am just wondering under what theory we will approach this. Aren't you in the position as the libelant in

this case, as long as it has been stipulated that the cargo was placed uncontaminated, isn't the burden then shifted to the respondent to show that he has properly and carefully loaded [139] and discharged the goods carried?

Mr. Hall: That is our contention, yes, your Honor. The reason for the testimony today is to indicate the possibilities of possible contamination. We don't know what caused it. All we can do is to show that there were these possibilities and leave the burden of explanation to the respondent where we believe under all the authorities it rests and those authorities, I believe, are most of them set out in my printed memorandum.

The Court: Well, we have cross-sectioned that back and forth, so far as that is concerned, but it isn't altogether clear to me, and it seems that at the present time we are taking the approach that the ship exercised due diligence when, under (2) the responsibility is to properly and carefully discharge this oil.

Now, since the oil has been discharged and since it is contaminated, does that immediately shift the burden upon the respondent to show that they have properly and carefully discharged that cargo?

Mr. Hall: I believe that to be the case. The burden rests with the respondent.

The Court: There is one other point that I am thinking about and that I want you to be prepared to argue. I believe Mr. Mack has been asking questions today concerning it, the question in the stipulation about the Charter Party, and that is paragraph 7 relating to the loading and pumping out of the [140] cargo of oil.

Does that limit the liability of the vessel at the end of the vessel's hose?

Mr. Hall: Is your Honor referring to paragraph 7 of the stipulation?

The Court: No, paragraph 7 of the Charter Party.

Mr. Mack: That is our contention. When it gets into that pipe—

The Court: Of course, I don't think there is any question under the law that this whole proceeding, in view of the paramount clause 25 comes under the Carriage of Goods by Sea Act. I think it is 1307, if I am not mistaken.

Now, there is a section here that seems to me would not be in conflict with the Carriage of Goods by Sea Act, and that is No. 7, which would limit the liability of the ship at the point of delivery. I am mentioning that to you gentlemen not because I am going to ask to hear from you on those points, and I make it a practice, as Mr. Mack knows, to let counsel know what I am thinking about so that if I get on the wrong track, why, counsel has an opportunity to straighten me out.

I made mention of those things because I had them in mind. We will take a recess until 10:00 o'clock tomorrow morning, gentlemen.

(Whereupon, at 4:30 o'clock p. m., January 30, 1945, an adjournment was taken until 10:00 o'clock a. m., Wednesday, January 31, 1945.) [141]

Los Angeles, California, Wednesday, January 31, 1945.
10:00 a.m.

The Court: Proceed, gentlemen.

L. SIMONSEN,

resumed the stand as a witness by and on behalf of the libelant, having been previously duly sworn, and was examined and testified further as follows:

Cross-Examination.

(continued.)

Mr. Mack: Miss Reporter, could we have the last question and answer read?

(Record read.)

Q. By Mr. Mack: Now, Mr. Simonsen, with respect to the use of spectacle flanges, if you used those down in the bottom of the ship in the No. 5 and 7 cross-overs as proposed by you, there is a possibility of error with the spectacles too, isn't there, human error in tightening them up and that sort of thing?

A. Yes. I will grant you that there is a possibility of an error, but after we have put the spectacle flanges in, we also test the line to make sure there are no leaks through the gaskets and around the spectacle.

Q. Do they generally test the lines too?

The Court: Will you speak louder, please?

Q. By Mr. Mack: They generally test the lines too with the regular valves, don't they?

A. Yes, that is quite true, but they can be altered.
[143] After you have set your valves and tested them, somebody can come along and open them up. You put a blind spectacle in and determine that it is tight, and the human element is out after that.

Mr. Mack: I think that is all.

The Court: May I ask have you had a mixed cargo delivered to you by the Keystone people?

(Testimony of L. Simonsen)

Mr. Hall: Pardon me, your Honor. Before you answer, may I have the question read?

The Court: What's that?

Mr. Hall: I didn't hear it.

(Question by the court read.)

The Witness: I can't answer that, sir, in my position.

The Court: You don't know?

The Witness: No.

The Court: Well, as I understand your testimony, you yourself never were able to ascertain the cause of this intermingling?

The Witness: That is right, sir.

The Court: The Egg Harbor delivered another cargo immediately following this, did they not?

The Witness: I presume so.

The Court: You don't know?

The Witness: I don't know. I don't know of any reason—I mean, I am not familiar with it, sir.

The Court: I thought you were located at Point Wells.
[144]

The Witness: Yes, sir.

The Court: Did I misread the captain's deposition to the effect that another cargo was delivered from Standard to Point Wells and a second cargo was taken on board at El Segundo and brought back to Point Wells in which there was no difficulty?

The Witness: I am not familiar with it.

The Court: You are not?

The Witness: No.

The Court: That is all I wanted to ask.

(Testimony of L. Simonsen)

Re-Direct Examination

By Mr. Hall:

Q. At any time when you were on the vessel the Egg Harbor on either the 24th or the 25th or the 23rd, did you handle or touch any of the valves or any other equipment on the vessel? A. Absolutely not, sir.

Q. Is it a practice of the Marine Department to instruct its shore personnel not to touch equipment or valves of a vessel? A. Yes, sir.

The Court: In that respect, did you examine the valves so far as they appeared on deck?

The Witness: Only visually. I never touched the valves.

The Court: Did you ascertain whether they were sealed or not? [145]

The Witness: Yes, I did, that is, on deck.

The Court: Were they sealed?

The Witness: Two valves were sealed on deck, yes, sir.

The Court: How about the rest of them?

The Witness: None of the rest were sealed, to my knowledge. I didn't see them.

The Court: You only observed two?

The Witness: That is right, sir.

Q. By Mr. Hall: Now, when you say "sealed," you mean there was a chain connecting the wheels on two of the valve extensions on deck so that the chain was sealed by some device, don't you?

A. That is what I mean, yes. I should like to make myself clear. As I observed them, there was a chain run through the wheels and a lock was used.

(Testimony of L. Simonsen)

The Court: Do you know whether that method would lock the valves in the position that they were in?

The Witness: Yes, sir, unless something unlocked them, that is **right**.

The Court: That method would lock the valves as they were set at the time?

The Witness: As long as they were not disturbed, that is **right**.

Q. By Mr. Hall: That method of sealing would not insure the tight fitting of the valve, would it?

A. You wouldn't know whether the valves were closed [146] or not. Nobody would know.

Mr. Hall: That is all.

The Court: That is all.

(Witness excused.)

Mr. Hall: Mr. Mack, I desire to offer the deposition of Lawrence C. Olsen. May it be stipulated that this deposition is deemed to have been read in evidence?

Mr. Mack: Yes. I will so stipulate.

The Court: That is the captain?

Mr. Hall: Yes.

The Court: I have read the deposition.

Mr. Mack: That will save the time of reading it into the record, and it is agreeable to me.

Mr. Hall: Then, if it is agreeable to the court, may it be introduced in evidence and deemed to have been read?

The Court: Yes, because I have read it.

(The document referred to was marked as Libelant's Exhibit No. 12, and was received in evidence.)

[LIBELANT'S EXHIBIT NO. 12]

[Title of District Court and Cause.]

DEPOSITION OF LAWRENCE C. OLSEN,

taken at Los Angeles, California, on Friday, December 22, 1944, at 11:00 a. m.

Deposition of Lawrence C. Olsen, taken on behalf of the respondents, at 1100 Banks-Huntley Building, 634 South Spring Street, Los Angeles, California, on Friday, December 22, 1944, at 11:00 a. m., before W. L. Heathcote, a Notary Public within and for the County of Los Angeles and the State of California, pursuant to oral stipulation.

Appearances of Counsel:

For Libelant: Lawler, Felix and Hall, by John M. Hall, Esq.

For Respondents: Lillick, Geary, McHose & Adams, by A. F. Mack, Jr., Esq.

Reported by: W. L. Heathcote.

LAWRENCE C. OLSEN,

called as a witness on behalf of the respondents, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Mack:

Let the record show that the deposition of Captain Lawrence C. Olsen is being taken at this time and place by stipulation of opposing counsel, Mr. John M. Hall, of Lawler, Felix and Hall, proctors for libelant;

That all objections except as to the form of questions are reserved to the time of trial.

(Libelant's Exhibit No. 12)

Mr. Hall: Yes, that is so stipulated.

Mr. Mack: May it also be stipulated, Mr. Hall, in view of the fact that Captain Olsen will only be here for a short time, the reading, signing, sealing, and certification of this deposition may be waived?

Mr. Hall: Yes, I will so stipulate.

Mr. Mack: Thank you.

Q. What is your full name, Captain?

A. Lawrence C. Olsen.

Q. Where is your present address, the address where you live?

A. 1323 Silvius Avenue, San Pedro, California.

Q. What is your occupation?

A. Master mariner.

Q. Captain, do you hold a master's license?

A. I do.

Q. Is that unlimited? A. It is unlimited, yes.

Q. And for how long have you held such a license?

A. Since November 11, 1942.

Q. Captain, are you presently engaged in going to sea?

A. I am.

Q. I will ask you, Captain, if you expect to leave Los Angeles, or the Los Angeles area, shortly on another voyage? A. I do, in three more days.

Q. Do you know where you are going? A. No.

Q. Nor where you will be? A. No.

Q. I will ask you if you have any knowledge or information at the present time as to whether or not you will be in Los Angeles or vicinity around or on January 30, 1945, which is the date probably set for the trial of this case? A. That I do not know.

Q. Captain, how long have you been going to sea?

(Libelant's Exhibit No. 12)

A. Since March 14, 1935.

Q. Have you been following the sea continuously since 1935? A. That is right.

Q. Has your experience as sea captain been confined to any particular type or class of vessels?

A. All tankers. In fact, with the same company.

Q. What is that?

A. It used to be the Pennsylvania Shipping Company, but now it is all incorporated into the Keystone Shipping Company.

Q. Is my understanding correct then, Captain, that since you have been going to sea, your experience has been limited to tankers only? A. That is right.

Q. By whom are you employed at the present time?

A. Well, I guess you would say the United States Government War Shipping Administration, but the Keystone Shipping Company is their general agent.

Mr. Hall: Don't you think that may call for a conclusion of the witness?

Mr. Mack: It may, Mr. Hall.

Q. Captain, I will ask you—

Mr. Hall: We can prove that by the log book, can't we?

Mr. Mack: Well, we won't go into that now.

Q. Captain, let me ask you this: Have you at any time in the past had anything to do with a vessel known as the SS Egg Harbor?

A. Well, I was master of the Egg Harbor from April 1, 1943, until September 28, 1944.

Q. Are you presently serving on the SS Egg Harbor?

A. No, sir.

(Libelant's Exhibit No. 12)

Q. Captain, is the Egg Harbor what is known in the maritime trade as a Swan Island tanker?

A. Yes, called a T-2-S.E. A-1. That is the type of tanker.

Q. Did you take the Egg Harbor out on its maiden voyage? A. Yes, sir.

Q. And, Captain, will you relate for us briefly your experience, if any, with the Egg Harbor up to the time you first sailed on the vessel's maiden voyage?

A. Well, I was transferred from the Bald Butte to the Egg Harbor, which was located at Portland, Oregon.

Q. About when was that?

A. Well, I arrived—I got off the Bald Butte about the 28th of March and I arrived at Portland, Oregon about the 1st day of April, 1943.

Q. And what did you do then, if anything, relative to the Egg Harbor?

A. Well, I went down on board the ship with the company inspectors and watched the work that was going on, and I climbed down the tanks and inspected the tanks and the pipe lines and the valves that took care of the lines, and the piping arrangements.

Q. At that time do you know if the vessel was still in the hands of the builders?

A. At that time the vessel was still in the hands of the builders, yes.

Q. Well, do you know, Captain, approximately when delivery was taken of the vessel from the builders?

A. I think it was on April 10th.

Q. Now at the time you arrived at Portland, Oregon, about April 1st, and first went on board the Egg Har-

(Libelant's Exhibit No. 12)

bor, were there any other officers on the vessel at that time?

A. The chief mate, Mr. Morris, and the second mate, Mr. Danielson.

Q. Did those men stay on the Egg Harbor, to your knowledge, up to the time delivery was taken?

A. That is right. They had their own—that is, they worked from eight o'clock in the morning until about four o'clock in the afternoon; they stayed aboard.

Q. What were they doing as far as you observed?

A. Just learning the general arrangement of the ship.

Q. Did you confer with them at any time about the arrangement of the ship and the cargo piping, and that sort of thing?

A. Well, I asked them how they were getting along with it, whether they were learning anything, if they were satisfied if they were learning about it, and they assured me—

Q. No, we can't have any conversation. All you can say is yes or no to that question.

A. Yes.

Q. Now, Captain, while you were on the vessel during that ten-day period or so before the delivery was taken, was there a trial run conducted?

A. Yes, we had a trial run, but I don't know the exact date.

Q. Was it some time before April 10, or afterwards?

A. Oh, yes, it was about the 7th, I believe. I am not quite certain of that, however.

Q. Were you on the Egg Harbor during its trial run?

A. That is right.

(Libelant's Exhibit No. 12)

Q. Where did you go?

A. We went from Swan Island Shipyard to Astoria and turned around and came back again.

Q. Now did you notice or observe any unusual results of any kind in the trial run; did you yourself notice anything?

A. No, all the tests that the—

Mr. Hall: Just a minute. The question calls for just what you observed, Captain, what you yourself observed, not what somebody else told you.

The Witness: No, I was watching the various tests, the various tests they conducted, like the anchor test and **trying** the fathom meter, and the course finder and the gyro compass. They all worked perfectly.

(Discussion by counsel off the record.)

Mr. Mack: Q. Incidentally, Captain, when you first arrived at Swan Island and went on board the Egg Harbor, where was she at that time?

A. Alongside the outfitting dock.

Q. Now I show you, Captain, this document here, which I have previously shown in its entirety to Mr. Hall, and I will ask you to tell us what that is, please, if you know (handing book to witness).

A. It is the log book of the deck department.

Q. Of the Egg Harbor?

A. Of the Egg Harbor, yes.

Q. In other words, that is what is known as the rough deck log of the Egg Harbor?

A. That is right.

Q. For what period of time?

A. From April 13, 1943, to May 12, 1943.

(Discussion by counsel off the record.)

(Libelant's Exhibit No. 12)

Mr. Mack: I will ask that the book be marked by the reporter for identification as Respondent's Exhibit 1.

(The document was so marked by the reporter.)

Mr. Hall: I will stipulate, Mr. Mack, that these documents which you are now having marked for identification may be retained in your custody until the time of trial so that we both may have access to them.

Mr. Mack: Thank you.

Q. Now will you tell us what this document is, please, Captain (indicating another book).

A. This is the smooth deck log *but* for the Egg Harbor.

Q. For the same period of time?

A. Yes, for the same period of time.

Mr. Mack: Will the reporter please mark this for identification as Respondent's Exhibit 2 for identification.

(The document was so marked by the reporter.)

Q. Now tell us what this is, please, Captain (handing further documents to witness).

A. This is the engineer's rough log book for the Egg Harbor.

Q. For what period of time.

A. For the period of April 12, 1943, to May 31, 1943.

Mr. Mack: I will ask that the reporter mark this for identification as Respondent's Exhibit 3.

(The document was so marked by the reporter.)

Q. Now what is this book, Captain (handing document to witness)?

A. This is the engineer's smooth log book for the Egg Harbor.

Q. For the same period of time?

A. For the Egg Harbor, yes, the same period of time; that is correct.

(Libelant's Exhibit No. 12)

Mr. Mack: I will ask the reporter to mark this for identification as Respondent's Exhibit 4.

(The document was so marked by the reporter.)

Q. Now what is this next document, Captain (handing document to witness)? A. This is the—

Q. When I say document, that represents three sheets of paper fastened together.

A. Yes. This is the engineer's rough abstract of the engineroom log book. Do you want the time?

Q. Yes, if you can tell us from a quick reading of them. A. Well, it goes from—

Q. Just tell us the period covered by the whole three sheets, if you can. A. April 14th to May 14th.

Q. 1943? A. Yes.

Mr. Mack: I will ask that these be marked by the reporter as Respondent's Exhibit 5 for identification.

(The documents were so marked by the reporter.)

Q. Now what are these three sheets here, Captain, the three typewritten sheets (handing documents to witness)? These appear to be a smooth copy.

A. Those are the engineer's smooth copies of the abstract of the engineroom log book.

Q. For the same period of time as the preceding ones which I have just handed to you?

A. Yes, for the same period of time.

Mr. Mack: I shall ask that these be marked by the reporter as Respondent's Exhibit 6, all of the sheets as one exhibit.

(The documents were so marked by the reporter.)

Q. Now, Captain, I don't know whether we will use this paper at all, but as long as you are here I will ask

(Libelant's Exhibit No. 12)

you to tell us what that is (handing document to witness)?

A. This is a copy of the crew list of the Egg Harbor leaving Portland, Oregon.

Q. On the maiden voyage of the ship?

A. On the ship's maiden voyage, yes.

Mr. Mack: I will ask that the list be marked as Respondent's Exhibit 7 for identification.

(The document was so marked by the reporter.)

Q. Now what is this paper, Captain (handing document to witness?)

A. This is the rough copy of the ullages of the cargo loaded at San Pedro and El Segundo and also has the discharging ullages on there, too.

Q. That would be discharging at Point Wells?

A. Yes, at Point Wells.

Q. That was on the maiden voyage?

A. That was on the maiden voyage, yes.

Mr. Mack: I will offer this document as Respondent's Exhibit 8 for identification and ask that it be so marked by the reporter.

(The document was so marked by the reporter.)

Q. What is this next sheet, Captain, the next one here (handing document to witness)?

A. This is a copy of the ullages of the cargo discharged at El Segundo, of the contaminated cargo.

Q. This is from the south bound trip after you had been up to Point Wells with the cargo?

A. That is right. This is the cargo we brought back.

Q. Will you give Mr. Hall the date on that?

Mr. Hall: Yes, what date was the contaminated cargo discharged?

(Libelant's Exhibit No. 12)

The Witness: On May 1st and May 2, 1943.

Mr. Mack: I will ask that the document be marked as Respondent's Exhibit 9 for identification.

(The document was so marked by the reporter.)

Q. Now, Captain, will you tell us, please, when you sailed originally from Swan Island, Portland, Oregon south bound, and you may use any of the logs that you wish, unless you remember it without looking.

(Discussion by counsel off the record.)

A. It was April 13, 1943.

Q. Captain, do you recall what transpired between the time you took delivery of the ship on or about April 10, 1943, and the time you sailed on April 13, 1943?

A. I believe the time was spent in tying up the last minute repairs at the shipyard; and we had to load ship's stores, and then we went to anchor to finish the signing on of the crew. We had a little trouble getting a crew. And then we had to have a fire and boat drill before we sailed. That took place on the morning of the 13th.

Q. Captain, did you sail empty or in ballast?

A. We sailed in ballast.

Q. Will you tell us what that means in plain English to somebody who is not used to the sea?

A. Ballast in a tanker is usually sea water pumped into the various tanks to make it more stable in a sea way. It brings the ship down to a certain draft where she will not pitch and roll too badly.

Q. Now, Captain, on the trips outbound in ballast did you check the cargo piping of the ship at all, or was it checked by anybody under your direction?

A. After we sailed we changed the ballast around a bit in various tanks, and the day of the arrival in San Pe-

(Libelant's Exhibit No. 12)

dro, we pumped out nearly all of the ballast. There was one tank of ballast left to bring us through the nets at the breakwater. So after the ballast was all pumped out except this one tank the first mate and the pump man tested the pipe line.

Mr. Hall: Wait a minute. I shall object to this unless it was something that you yourself observed. Was this something that you observed?

The Witness: Oh, yes.

Mr. Hall: All right.

Mr. Mack: Q. All right, go ahead, Captain.

A. And the first mate and the pump man tested the pipe line and the suction valve by water pressure. By that I mean the closing of the valves and putting a pump pressure against water in the pipe lines.

Q. Do you know how much pressure was applied at that time? A. Yes, 125 pounds.

Q. What was the result as you observed it of that pressure test of the cargo lines?

A. There were no leaks as far as I could tell.

Q. Is it customary, Captain, from your experience in the tanker game to make such a line test or check of cargo pipe lines before taking on cargo?

A. It has been my practice to test all pipe lines and all valves before a new cargo is loaded, and I imagine all tanker men do the same thing.

Q. Now after you made that test you proceeded to loading at San Pedro?

A. I got alongside the dock at San Pedro and we pumped out the rest of the ballast and we had another line test in order to test the tank that had had the ballast in it.

(Libelant's Exhibit No. 12)

Q. What was the result as you observed it of the line test of that particular tank?

A. There were no leaks.

Q. Now after that line test did you then proceed to load cargo at San Pedro?

A. We loaded diesel oil at San Pedro.

Q. And after the diesel oil was loaded did you then proceed to load the gasoline?

A. We went to El Segundo and loaded the gasoline.

Q. Was there a Captain Hogstrom on the vessel during all of the loading operations? A. Yes, he was.

Q. Will you briefly tell us who Captain Hogstrom is?

A. Captain Hogstrom is the port captain for the Keystone Shipping Company at San Pedro.

Q. Now, Captain, before loading was commenced at San Pedro did you personally check the cross-over valves on the vessel? By that I mean the—

A. I watched them being closed and sealed, but I didn't try them myself.

Q. Well, in other words, let me put the question this way: Were you present when any closing or check of the cross-over valves were made before loading operations commenced? A. That is right, I was.

Q. Please tell us what you observed and what was done?

A. I watched the chief mate and the quarter master close the cross-over valve at No. 5 tank, and he closed it tightly, or what appeared to be tightly, with what they call a wheel wrench, because it applied more pressure, and then they chained and sealed the valve.

Q. Was anybody else present with you watching this operation? A. Captain Hogstrom was.

(Libelant's Exhibit No. 12)

Q. And how about No. 7 cross-over?

A. That was closed and sealed the same way.

Q. Now, Captain, after you had loaded the gasoline at El Segundo did you then proceed on the rest of the voyage to Point Wells? A. Yes, we did.

Q. Can you tell us, please—and you can use any of the logs that you wish—when you arrived at Point Wells?

A. We arrived alongside the dock at Point Wells at 5:30 a. m. on April 23, 1943.

Q. Can you tell us, please, what the state of the weather was at the time you arrived there?

A. There was a howling gale blowing just at the time we were tying up and it increased in force after we were alongside, and we couldn't start pumping cargo until the storm abated.

Q. When did the pumping operations commence; that is, the discharge of the vessel?

A. At 1:50 p. m. on the 23rd.

Q. Captain, when the vessel arrived at Point Wells and before pumping operations were commenced did you personally check or watch being checked the cross-over valves at No. 5 and No. 7?

A. I checked them myself; not the numbers, but I checked the valves to see that the seals were still on them.

Q. Were the seals still on them?

A. The seals were still on them, yes.

Q. Were the seals broken in any way?

A. No, they were still secure.

Q. Were the valves shut?

A. To my knowledge they were, yes, sir.

Q. Captain, were you on the vessel when the pumping operations commenced? A. I was.

(Libelant's Exhibit No. 12)

Q. Did you later receive any report from the dockman of the Standard Oil Company of California about any contamination; I mean by that, you yourself?

A. Not officially. After it all happened and I came back aboard the ship—after I got back aboard the ship I was informed that there was contamination.

Q. You learned when you came back on board ship that there was some contamination?

A. No, they called me up at the hotel.

Q. Had you left the ship after discharge operations had commenced?

A. Oh, yes.

Q. And who was in charge during your absence?

A. The chief mate.

Q. Did you have any discussion afterwards with any men of the Standard Oil Company about any contamination or the testing of any of the products?

Mr. Hall: Just a minute. You can answer that question yes or no, and then counsel will ask you another question.

The Witness: Yes.

Mr. Mack: Q. Will you tell us with whom it was and where and at what time especially, and who was present. You don't have to remember right to the minute, but just generally, whether it was in the evening or in the morning or something like that, and give us the men's names if you can remember them.

A. Well, there was a Mr. Simonson, for one. I can't think of the other man's name.

Mr. Hall: Was it Mr. Kilbourne?

A. Yes, that was the other one. And after I came down to the ship and I saw what took place I went over to the dock office and saw Mr. Simonson and Mr. Kil-

(Libelant's Exhibit No. 12)

bourne, and they asked me various questions about the pipe lines and the valves, and in fact I brought them over the cargo plan and showed them the piping arrangements, and they asked me if I knew what caused the contamination, and I couldn't tell him anything. I didn't know.

Mr. Mack: Q. Did you afterwards take Mr. Kilbourne and Mr. Simonson on the ship?

A. I didn't; Mr. Hicks and Mr. Stevens did.

Q. Was that, to your knowledge, to permit them to check the lines and that sort of thing?

Mr. Hall: Just a moment. That is objected to as calling for a conclusion of the witness. The form of the question is objectionable.

Mr. Mack: Q. Did Mr. Simonson and Mr. Kilbourne go on board the Egg Harbor after this discussion some time? A. That is right, they did.

Q. And were they on board the Egg Harbor for some period of time, to your knowledge?

A. A couple of hours, I guess, checking over the valves and pipe line arrangements.

Q. Did you have any conversation with them after they had been on the Egg Harbor?

A. Oh, yes, surely.

Q. I mean, about this contamination that they referred to? A. Oh, yes.

Q. What did they say to you?

Mr. Hall: Pardon me. Is this a second conversation?

Mr. Mack: Yes.

Mr. Hall: Won't you lay a foundation for it?

Mr. Mack: Yes; all right.

(Discussion by counsel off the record.)

(Libelant's Exhibit No. 12)

The Witness: Well, we had no special appointment. I did go up in the office after two or three hours, maybe.

Mr. Mack: Q. Well, let me ask you this, Captain: After Messrs. Simonson and Kilbourne had been on the Egg Harbor and after you first talked with them did you have any later talk or talks with them about their visit on the vessel? A. Just informal, that was all.

Q. Do you recall what the substance of any of those conversations was on those occasions, as far as the vessel was concerned?

A. Well, it was merely if I had any idea as to what caused the contamination. I related that as far as I knew—

Mr. Hall: Wait just a minute. May I have that answer, please?

(The last answer as far as given by the witness was read by the reporter.)

The Witness: (Continuing) As far I knew the tank valves were properly set and all of the seals were in order, and the ship was properly lined up to discharge cargo. But what caused the contamination I didn't have the least idea. They wanted to know if it was the mate's fault or my fault or the fault of the valve or a leaky tank, and I told them I didn't know. They did create an objection about the spectacle blanks not being turned, and they asked me why we didn't do it, and I didn't know—that is, I don't know what I told them about that now.

Mr. Mack: Q. Were the spectacle blanks set before discharge commenced at Point Wells on this voyage?

A. No.

(Libelant's Exhibit No. 12)

Q. Now, Captain, did Messrs. Simonson and Kilbourne show you any of what they contended was the contaminated cargo? A. No, not to me they didn't.

Q. Did you afterwards sail from Point Wells south bound again?

A. That is right, back to El Segundo.

Q. And did you carry a certain amount of cargo out with you on that occasion?

A. Approximately 45,000 barrels of contaminated diesel oil and gasoline.

Q. When you refer to the expression "contaminated," did you check it yourself, or did the vessel check it, to your knowledge?

A. There was no way of having the vessel checked except by the color of it.

Q. Was it off color, or did you see it?

A. I never even saw any of it.

Q. Did you discharge this contaminated cargo, as we may refer to it, at El Segundo then at the end of your south bound voyage? A. Yes, we did.

Q. And was that at the Standard Oil mooring there?

A. Yes, that is right.

Q. And that was into the Standard Oil Company's lines?

A. That is right.

Q. Captain, were the officers on the Egg Harbor on this maiden voyage, in addition to yourself, regularly licensed men, to your knowledge?

A. Yes, they were all licensed officers.

Q. Do you know whether any of the officers on that maiden voyage had had previous experience with tankers?

A. Three of them had that I know of, the mate, the second mate, and the senior third mate.

(Libelant's Exhibit No. 12)

Mr. Mack: I believe that is all. You may cross-examine.

Recess.

Cross-Examination

By Mr. Hall:

Q. You had had no experience with tankers before 1935, had you? A. That is right.

Q. Now did you ever have any experience with a tanker having the cargo arrangements that the Egg Harbor had prior to the time you became master of the Egg Harbor? A. No, sir.

Q. Now you have said that you arrived at Portland, Oregon on April 1, 1943; that is correct, is it?

A. That is right, yes.

Q. And did you go immediately to the tanker Egg Harbor? A. I went the same day, yes, sir.

Q. And the tanker, I think you said, was then alongside the outfitting dock? A. That is right.

Q. Now you said that you went on board the ship in company with the inspectors. Did I get your testimony correctly in that regard; is that correct?

A. That is correct, yes.

Q. Now were those inspectors people who were connected with the builders of the vessel?

A. No, sir, connected with the company; they were company inspectors.

Q. You mean by that the Keystone Shipping Company? A. That is right.

Q. And what were their names?

A. Mr. Stevens and Mr. Hicks.

Q. Now when you said that you—in company with those inspectors—inspected the tanks and the pipe lines

(Libelant's Exhibit No. 12)

and valves, you mean, do you not, that you simply went over the vessel and looked at the tanks and the pipe lines and the valves for the purpose of familiarizing yourself with the layout; isn't that correct?

A. That is correct, yes.

Q. And you didn't at that time make any tests of the working order of the tanks or the pipe lines or the valves, did you?

A. No, sir.

Q. As far as you observed there was no test made of any of the vessel's tanks or pipe lines or valves until the vessel got to San Pedro after its voyage south bound from Portland to San Pedro; is that correct?

A. Not by the crew itself, but—

Q. No; I am asking you what you yourself observed?

A. No, I didn't see any.

Q. You didn't actually see any other tests made, did you?

A. No.

Q. You had been on the vessel, had you not, from April 1, 1943, until the vessel's arrival at San Pedro on April 17, 1943?

A. Yes.

Q. Now during that period of time from April 1, 1943, to April 16, 1943, no tests had been made of any of the vessel's tanks or pipe lines or valves, had they?

A. Oh, yes.

Q. What tests had been made?

A. The shipyard made their tests.

Q. On what date?

A. That I don't know.

Q. You weren't present then, were you?

A. No, I was not.

Q. Didn't I understand you to say that you were on the vessel at all times from April 1, 1943, to April 16, 1943?

A. I didn't live aboard the vessel, no.

(Libelant's Exhibit No. 12)

Q. When did you begin to live aboard the vessel?

A. On April 13, 1943.

Q. And was that the day it left—

A. That is right.

Q. Left Portland, Oregon? A. That is right.

Q. From then on were any tests made until April 16, 1943? A. Yes, there were.

Q. What tests were made?

A. There was a water test on the lines, in the cargo lines.

Q. Do you recall what day that water test was made?

A. It was the day before arrival at San Pedro.

Q. The day before the ship's arrival at San Pedro?

A. Yes.

Q. That would be April 15, 1943, wouldn't it?

A. That is right.

Q. And you say on that day the water test was made?

A. That is right.

Q. Up to that time that the water test was made on April 15, 1943, had you yourself been present at or had you seen any tests made of the vessel's tanks, pipe lines, or valves? A. No.

Q. Now will you describe again just what that water test was which was made on April 15, 1943?

A. Well, with all of the tank valves closed they pump water up into the cargo lines at a pressure of 125 pounds, and from what we observed there were no leaks.

Q. Now the vessel was at sea at that time, wasn't it?

A. That is right.

Q. Was that test made tank by tank?

A. Oh, yes, certainly.

(Libelant's Exhibit No. 12)

Q. In other words, there was a test made, and I am speaking now of this water test— A. That is right.

Q. There was a test made of each of the vessel's tanks while the vessel was at sea on April 15, 1943?

A. That is right, except for that one ballast tank that we had left to arrival at San Pedro.

Q. Now which tank did you leave full of water ballast when you were coming into San Pedro?

A. I think it was No. 5 main and No. 7 wings.

Q. Now the tanks on that vessel run crosswise of the vessel, don't they? A. That is right.

Q. And each one is divided into three compartments?

A. Yes.

Q. And when you speak of the wing tanks you mean the port and starboard tanks? A. Yes.

Q. So in each of those tiers of tanks there would be a center tank? A. That is right.

Q. So that your recollection is that the tanks which were left full of water ballast when coming into San Pedro were the center No. 5 tank and the starboard and port No. 7 tanks? A. That is right.

Q. And those tanks were not tested by this water test in the manner that you have described until after arrival at San Pedro, is that correct?

A. That is right.

Q. Now I show you the document which has been described as the vessel's rough bridge log book and is now marked Respondent's Exhibit 1 for identification, and I will ask you if there is any notation in this log book of any such water tests (handing document to witness). A. I don't see any.

(Libelant's Exhibit No. 12)

Q. Then your answer is that there is no notation in that log book of any of these water tests that you are referring to in your testimony, is that correct?

A. That is correct.

Q. Now going back to April 15, 1943; at the time these water tests were made it is your testimony, is it, that all of the vessel's tanks except No. 5 main tank and No. 7 port and starboard tanks were so tested?

A. That is correct.

Q. Now the tanks so tested had to be emptied, did they not, before the test could be made?

A. Yes, that is right.

Q. In other words, the water ballast was pumped out, is that correct?

A. That is right.

Q. Now through what line was the pressure applied on a given tank in making that test, after the valves had been closed; was it the discharge line or the suction line or some intake line?

A. It was a suction line.

Q. You are referring now to the main suction line and stripper line?

A. That is right.

Q. Well, then if I understand you correctly, this test was made by applying pressure back from the pump through the main suction line into the tank after the valves of the tank had been closed; is that right?

A. That is right.

Q. Now in saying that the valves of the tank were closed, you mean by that, do you not, that all openings into the tank except through the line through which the pressure was applied had been closed; isn't that right?

A. That is right, yes.

Q. Now was that pressure water pressure or was it air pressure?

A. That is right, it was water pressure.

(Libelant's Exhibit No. 12)

Q. Then if I understand you correctly, 'there' was water pumped back into each of those tanks through the suction lines through which in the normal course cargo would have been sucked out of the tanks by the pumps; is that correct? A. That is correct.

Q. The pressure used was what; that is, in pumping that water into the tanks?

A. One hundred twenty-five pounds.

Q. Did you personally attend and inspect that water tank test with respect to each and all of these tanks that were tested on that occasion? A. I did not.

Q. How many times were you present when the tests were made? A. None.

Q. You weren't present when any of the tests were made? A. No.

Q. Then your testimony as to the tests that were made is based upon something that was told you; is that correct? A. By the chief mate, yes.

Q. The chief mate told you? A. Yes.

Q. What was his name? A. Morris.

Q. Do you know his first name or his initials, please?

A. Oh, no; it wasn't Morris, either. It was Danielson. No, Morris was the mate going down, and—

Q. Then on this voyage south when these tanks were tested Arthur Morris was the first mate and Axel Danielson was the second mate, is that right? A. Yes.

Q. And in nautical language the first mate is usually called the mate, is he not? A. That is right.

Q. Now who reported to you that these tests had been made? A. The chief mate.

Q. That would be Arthur Morris?

A. That is right.

Q. Was that a verbal report? A. Yes.

(Libelant's Exhibit No. 12)

Q. Prior to that report being made had you instructed Morris to make those tests? A. Yes.

Q. Do you recall what time of the day of April 15, 1943, you received that report from Morris?

A. Oh, no, I don't.

Q. Do you recall what time of the day it was reported to you that those tests were made?

A. It was in the evening; I know that.

Q. In the evening of April 15, 1943?

A. That is right.

Q. Now after arriving at San Pedro you said that another water test was made, is that correct?

A. That is right, yes.

Q. Did you observe that test? A. No, sir.

Q. So that all your knowledge of that is derived from the report of some ship's officer?

A. That is right.

Q. Is that true of the tests made of No. 5 main tank and No. 7 port and starboard tanks?

A. That is right.

Q. Was that test conducted in the same way as the tests made on April 15, 1943? A. That is right.

Q. How much water was pumped into each of those tanks under pressure when these tests were made?

A. No water; the pipe line was filled and then there is a constant pressure against the water in the pipe line, and with the valves closed. If the valves don't leak then there isn't any way for the water to come into the tank. That is the way we check them.

Q. In other words, the pipe was filled with water?

A. Yes, that is right.

(Libelant's Exhibit No. 12)

Q. And then pressure was applied against the valve leading into the tank, is that right?

A. That is right.

Q. Now with respect to any of these tanks, did that test disclose any water moving into the tank?

A. There were no leaks reported.

Q. By a leak you mean water going through the valve into the tank, is that correct? A. Yes.

Q. That is right, is it? A. Yes.

Q. Now did water go through any valves into any tank at the time any of these tests were made?

A. I would say no.

Q. You know that is the case, do you?

A. That is what the mate told me when he made his report.

Q. You don't know, as a matter of fact, that there was any test, any water test such as you have described, made with respect to the double valves on the cross-over in No. 5 tank or the double valves on the cross-over in the wings of No. 7 tank, do you?

A. Not that I know of, no.

Q. Now the purpose of this water test was to test the proper closing of the valves, was it?

A. That is right.

Q. Was any test applied to the valves on the discharge side? A. Not that I know of.

Q. Well, no such test was ever reported to you with reference to the valves on the discharge side, was it, at any time? A. No.

Q. Is this water test sometimes referred to as a hydrostatic test? A. I don't know.

Q. You don't know that?

A. I don't even know what hydrostatic means.

(Libelant's Exhibit No. 12)

Q. Were there on the Egg Harbor any cross-overs on the discharge side of the pipes leaving the pumps?

A. Yes.

Q. There were? A. Yes.

Mr. Hall: I will ask that this document which bears in the lower right hand corner the words "Diagrammatic Arrangement of Cargo Pipes, T-2 S. E. A-1, Pacific Tankers, Inc., San Francisco, Calif." be marked as Libelant's Exhibit A for identification only.

(The document was so marked by the reporter.)

Mr. Hall: May it be stipulated, Mr. Mack, that this exhibit for identification, which has just been marked by the reporter, may remain in my custody until the time of the trial subject to inspection by both counsel.

Mr. Mack: Yes, certainly.

Mr. Hall: Q. I show you, Captain, a document marked by the reporter as Libelant's Exhibit A for identification and I will ask you if that plan or blueprint shows the arrangement of the pipes and pumps and valves and lines that prevailed on the Egg Harbor during the period that we have been talking about (handing document to witness). A. Yes, it is.

Q. Now I have been speaking rather generally about pump lines and discharge lines, and I want to be sure that I understand those terms in the way that you do. In general, the pump lines are the lines from the tanks, that is, leading from the bottom of the tanks to the pumps, are they not? A. That is right.

Q. And the discharge lines are the lines leading from the pumps to the deck of the vessel and to the hose connections on the deck of the vessel?

A. That is right.

(Libelant's Exhibit No. 12)

Q. Then there is a line known as a stripper line, is there not? A. Yes.

Q. Which is common to all tanks? A. Yes.

Q. Is that a suction line?

A. That is a suction line, yes.

Q. Now I think it is your testimony that there was no report made to you of any water or other tests in respect to the discharge lines; is that correct?

A. That is right.

(Discussion by counsel off the record.)

Q. Now just what was it that the mate said to you, as near as you can now recall, when he reported to you that the water test had been made with respect to the suction lines?

A. I don't know. All I know is that the gist of it was that the tests had been made and there were no leaks found.

Q. Now was there water ballast in all of the tanks of the vessel on the way down from Portland on that first run prior to the time when they pumped out some of the tanks to make this water test? A. No.

Q. Which tanks were loaded with water ballast on that run? A. I don't know. I know how—

Q. Does the log show that? A. No.

Q. Do you know that there was any water ballast?

A. Oh, yes.

Q. But you can't state which tanks it was in?

A. No, I can't.

Q. Now, Mr. Mack spoke of a maiden voyage; was that the voyage from Portland, Oregon to San Pedro, or

(Libelant's Exhibit No. 12)

was it the voyage upon which the vessel carried that cargo of diesel oil and gasoline north to Point Wells?

A. That was the maiden voyage from Portland, Oregon to San Pedro and back to Point Wells.

Q. So when you refer to the maiden voyage you are referring to the trip south and the trip back again?

A. That is right.

Q. Both runs were included in the maiden voyage of the vessel, is that right? A. That is right, yes.

Q. Prior to that maiden voyage the vessel had not been at sea except for this trial run to Astoria, is that correct?

A. She wasn't even at sea then. She was in the river.

Q. Well, that was the only time that the vessel had been under way prior to this maiden voyage, is that correct? A. That is right, yes.

(Discussion by counsel off the record.)

Mr. Hall: Q. Now I think in your answer to a question by Mr. Mack you said that on the trip south on the maiden voyage they changed the water ballast around. What was that change?

A. On leaving the shipyard they had it in nearly every tank, I believe, and some of the tanks weren't pumped full so I wanted the ballast in the tanks brought up full; I wanted the tanks all filled up to the top. So we had to pump some of the tanks dry and then fill up the rest of the tanks, but I don't know which ones now they were. I know how I ballasted them; a certain way—but every other trip I changed them, like one trip I have No. 2 center and No. 3 wings and No. 5 center and No. 6 wings and No. 8 center and No. 9 wings, and on the last trip I filled up No. 2 wings and No. 3 center

(Libelant's Exhibit No. 12)

and No. 5 wings and No. 6 center and No. 8 wings and No. 9 center; but how I had the arrangement on that first trip I just don't know.

Q. Now in discharging water ballast at sea the water in the tank is sucked out through the suction lines and discharged through the discharging lines; isn't that correct? A. Pumping ballast?

Q. Yes.

A. It can be, or it can go through an overboard discharge that leads out of the pump room.

Q. But the water would have to go through the pumps. would it not? A. Oh, yes.

Q. Now in removing fluid from the tanks through the suction lines you can't get the fluid completely out of the tanks, can you, without using the stripper lines?

A. No.

Q. Is my statement correct?

A. That is right, yes.

Q. What I said was correct?

A. That is right, yes.

Q. In other words, to get the tanks clean of fluid you would have to use the stripper line, would you not?

A. That is right.

Q. Were you present when the water ballast was pumped out of these tanks before this water test was made on April 15, 1943? A. No.

Q. You didn't see them pump out the water ballast, did you? A. No.

Q. So you don't know what suction lines were used, do you? A. No, I couldn't say as to that.

(Discussion by counsel off the record.)

Q. Now you said that Captain Hogstrom was on the vessel during the loading operations? A. Yes.

(Libelant's Exhibit No. 12)

Q. I take it from that that he was on board the Egg Harbor at all times while the diesel oil was being loaded at San Pedro? A. That is right.

Q. Was he on board the Egg Harbor at all times while the gasoline was being loaded at El Segundo?

A. That is right.

Q. Did he then leave the vessel or did he proceed to Point Wells? A. No, he left the vessel.

Q. Now in answer to a question by Mr. Mack you said that you personally watched the cross-over valves being closed and sealed? A. That is right.

Q. I think in that connection you mentioned the cross-over valves at No. 5 tank and the cross-over valves at No. 7 tanks? A. That is right.

Q. Were any other cross-over valves closed and sealed? A. No, that was all.

Q. You have referred to the term "spectacles". The spectacles have an open part and they have a closed part, do they not? A. That is right.

Q. Was it the closed part of the spectacles that was used at any place in the pipe lines on the Egg Harbor on that voyage? A. No.

Q. Then, if I understand you correctly, no use was made of the spectacles in blocking the pipes on this voyage on which this cargo was taken on board at San Pedro and El Segundo; is that right?

A. That is right, yes.

Q. Now how were these valves on No. 5 tank sealed?

A. With a length of chain and a No. 1 car seal, a box car seal.

(Discussion by counsel off the record.)

Q. You mean, do you not, that the wheel handles of the two valves controlling the cross-over in No. 5 tank

(Libelant's Exhibit No. 12)

were chained together and the chain held by a car seal; is that right? A. That is right.

Q. Was the same method used with respect to the two cross-over valves in No. 7 tank?

A. That is right.

Q. Were any other valves chained and sealed?

A. The master valve between 9 tank and 8 tank were chained and sealed.

Q. What did they chain that valve to?

A. I don't know, probably another valve.

Q. Did you see them shut that valve?

A. No, I didn't see them shut it.

Q. Did you see them chain it?

A. No, I didn't see them chain it, but I saw it after it was chained.

Q. Was the chain sealed to something?

A. Yes, but I don't know what valve it was.

Q. Are you sure about that?

A. Oh, yes, it was chained and sealed, but I don't know which valve it was chained to.

Q. Now were there any other valves chained and sealed except these you mentioned; that is, the valve at No. 5 tank and the valve at No. 7 tank and the master valve between tanks 8 and 9?

A. That is all I can recall.

Q. Now were you on board at Point Wells when discharging of the cargo commenced on April 23, 1943?

A. Yes, I was.

Q. By reference to Respondent's Exhibit 1 for identification, I notice that on April 23, 1943, the SS Egg Harbor started its discharging of gasoline at 1:50 p. m.

(Libelant's Exhibit No. 12)

and started discharging diesel at 2:23 p. m.; is that correct (handing document to witness)?

A. That is right.

Q. Is that your best recollection now that that is accurate?

A. That is accurate as far as I know, yes.

Q. Then you were on the vessel until after 2:23 p. m., is that correct?

A. That is correct.

Q. When did you leave the vessel?

A. Somewhere around 3:00.

Q. And you went to a hotel then, did you?

A. I went to the Navy Office first and the agent's office, and then I went into Seattle. I was in Seattle then until I went to a hotel.

Q. When you left the vessel you were discharging both gasoline and diesel furnace oil?

A. Yes.

Q. What tanks were they discharging fluid from when you left the vessel?

A. That I don't know.

Q. I notice in this log book under the column entitled "Watch Officer's Signature for April 23, 1943," the initials J. C. H. Can you tell me whose initials those are?

A. The junior third mate, Mr. Hardy.

Q. J. C. Hardy?

A. That is right.

Q. I notice in the same exhibit on the page dated April 24, 1943, initials which look like A. F. D.

A. That is right.

Q. Can you tell me whose initials they are?

A. Those are the initials of Mr. Danielson, the second mate.

Q. Now when you left the vessel after it had commenced to discharge cargo at Point Wells what officers did you leave on board?

A. They were all on board, all four mates.

(Libelant's Exhibit No. 12)

Q. Now give me again so that we may get it clear who they were and what their names were and official designations.

A. There was Mr. Morris, the first mate, and Mr. Danielson, the second mate, and Mr. Thoren, the senior third mate, and Mr. Hardy, the junior third mate.

Q. Did any of those officers have anything to do with the operations connected with the discharging of the cargo?

A. The chief mate was in charge of it.

Q. Does the chief mate give orders to the pump man?

A. Yes, he does.

Q. Do you know whether or not the chief mate remained on the vessel at all times while you were absent?

A. Well, they told me he was gone after they started pumping, that he left the vessel.

Q. Then if I understand you correctly he was on the vessel when you left in the middle of the afternoon, but he left shortly thereafter; is that correct?

A. That is right.

Q. Now did any of these other mates leave the vessel while the cargo was being discharged on that day?

A. I don't know.

Q. How long had you known Axel Danielson who was the second mate on that voyage?

A. From Portland, Oregon.

Q. In other words, you first became acquainted with him when he joined the vessel about April 1, 1943, is that correct?

A. That is right.

Q. How long had you been acquainted with Mr. Hardy and Mr. Thoren?

A. Just the same time.

Q. Do you know anything about the knowledge that Mr. Danielson or Mr. Hardy or Mr. Thoren had with

(Libelant's Exhibit No. 12)

respect to the tanks' pipes and valves, and their methods of operating the same on this vessel?

A. I wonder if I could have that again, please.

(The pending question was read by the reporter.)

A. No, I don't, not for sure.

Q. Now I think you said that somebody called you at the hotel in Seattle and told you they were having some trouble in connection with this cargo that was being discharged?

A. Yes.

Q. Who called you, do you know?

A. Mr. Hicks.

Q. Did he tell you to come out to the vessel?

A. Yes.

Q. And you did so? A. Yes.

Q. What time did you arrive; was it after dark?

A. No, it was the next day in the morning.

Q. Then you didn't return to the vessel until the morning of April 24, 1943, is that correct?

A. No, sir, I did not.

Q. I want to be perfectly clear about that. You left the vessel about 3:00 on the afternoon of April 23, 1943, and you did not return to the vessel until the morning of April 24, 1943, is that correct?

A. That is right, yes.

Q. What time of the morning on April 24th did you reach the vessel?

A. Oh, I don't know, nine or ten o'clock, whichever it was.

Q. Were they discharging any diesel oil or gasoline when you reached the vessel in the morning?

A. Yes, they were discharging.

(Libelant's Exhibit No. 12)

Q. Do you know what tank they were emptying then?

A. No, they were only pumping out one cargo at a time.

Q. You mean by that they were pumping out only one tank at a time?

A. One grade of cargo, gasoline or oil, I don't know which.

Q. I see. Were Mr. Hicks or Mr. Stevens there when you arrived on the morning of April 24, 1943?

A. Yes.

Q. Were they both there? A. Yes.

Q. Did you talk with them? A. Yes, sir.

Q. Are they engineers?

A. Yes, sir, both of them.

Q. Are they connected in some way with the Keystone Shipping Company?

A. Yes, sir; I don't know the official titles, but they are company inspectors; that is what they call them.

Q. Now when you got back to the vessel on the morning of the 24th of April, 1943 who was the first person you talked to?

A. Both Mr. Hicks and Mr. Stevens.

Q. It was after talking to them that you talked to Messrs. Simonson and Kilbourne for the first time?

A. That is right.

Q. Did you talk to Messrs. Hicks and Stevens frequently that day? A. Oh, yes.

Q. They were in and out, weren't they?

A. That is right.

Q. And you did quite a lot of talking to them?

A. That is right.

(Libelant's Exhibit No. 12)

Q. And you did quite a lot of talking to them before you talked to Messrs. Simonson and Kilbourne, didn't you? A. They told me about it.

Q. I am not asking you what they told you, but I am asking whether you talked to them before you talked to Messrs. Simonson and Kilbourne; I think I have already asked you that question, but it is a fact that you did talk to them before you talked to Messrs. Simonson and Kilbourne; isn't that true?

A. Yes, that is right.

Q. There were spectacles on the vessel on that voyage, were there? A. Yes.

Q. Do you know where they were located?

A. In the pump room and on the discharging manifolds.

Q. That is, they were on the cross-overs between the lines on the discharge side of the pump room?

A. Yes.

Q. And they were on the cross-overs where the lines on deck go overboard, is that correct?

A. That is correct, yes, sir.

Q. But none of those spectacles were used?

A. No, sir.

Q. Now after the Egg Harbor discharged its contaminated products at El Segundo on May 1, 1943, and May 2nd, the vessel thereafter loaded out another cargo, didn't it? A. That is right.

Q. You were master on that voyage, were you?

A. That is right.

Q. What did that cargo consist of?

A. May I look at the log book?

Q. Yes, certainly (handing the book in question to witness).

(Libelant's Exhibit No. 12)

(Discussion by counsel off the record.)

Q. Now after this contaminated cargo was discharged at El Segundo the vessel went on another voyage, did it not? A. That is right.

Q. How soon after that did it leave port?

A. It left port on May 2, 1943, on that voyage.

Q. From what port was that? A. El Segundo.

Q. What was the vessel loaded with?

A. Supreme gasoline and Standard gasoline.

Q. In other words, two grades of gasoline?

A. Yes, that is right.

Q. Where did the vessel proceed with this double cargo? A. To Point Wells again.

Q. Now on that voyage was there any contamination of those two grades of gasoline? A. No, sir.

Q. Speaking of this voyage now upon which the diesel oil and the gasoline loaded on April 17th and 18, 1943 was carried to Point Wells, do you know which tanks of the vessel carried gasoline and which tanks carried diesel oil?

A. May I refer to the ullage sheets?

Q. Yes, certainly.

A. I know the tanks, but I am not sure exactly—

Q. This is Respondent's Exhibit A for identification (handing documents to the witness).

A. Yes. Well, the gasoline was—No. 2, 3, 4, and No. 9 carried gasoline. No. 5, 6, 7, and 8 carried diesel oil.

Q. Was there anything in No. 1 tank? A. No.

Q. Well, now, the vessel's officers discussed, did they not, which tank or tanks could carry the gasoline and which tank or tanks could carry the diesel oil; isn't that correct? A. That is right, yes.

(Libelant's Exhibit No. 12)

Q. Now what officer or officers of the vessel, or members of the crew, had the duty of handling the valves during the unloading process at Point Wells?

A. All of the officers and the sailors on their watch, on their respective watches.

Q. Well, let me put the question this way: Suppose that it became necessary to change a valve during the unloading process; what ship's officer or officers would have to make that change?

A. The mate on watch or the chief mate.

Q. Would the pump man or the pump men have been under any duty to change the valves? Is that part of their province?

A. That is part of their job.

Q. Do they do that under orders of the mate?

A. Well, no, they don't. Usually a pump man—the pump men will go ahead and pump it out themselves.

Q. So that a pump man may change a valve without any orders from any mate of the vessel, is that correct?

A. That is right.

Q. Now do you know who at Point Wells directed the valves to be changed?

A. When they started discharging cargo the chief mate did, but thereafter I don't know who it was.

Q. But it became necessary to change the valves at that time in discharging that entire cargo?

A. That is right.

Q. Do you know who gave the orders for that?

A. No, I don't.

Q. Do you know who actually made the changes in the valves from time to time, incident to the discharge of that cargo?

A. No, I don't.

(Libelant's Exhibit No. 12)

Q. Wasn't it reported to you when you returned to the vessel that there had been a mistake in opening one of the valves on the vessel?

A. They thought so, but they were not sure.

Q. Whom do you mean by "they"?

A. Mr. Stevens and Mr. Hicks.

Q. They thought that somebody had improperly opened a valve?

A. Yes.

Q. They so stated to you, did they?

A. That is right.

Q. Did they both state that to you?

A. That is right.

Q. This was after you returned to the vessel on the morning of April 24, 1943?

A. That is right.

Q. There were no other tests or tests that were reported to you or that you knew anything about between April 10, 1943 and the time when they started to load diesel oil at San Pedro on April 17, 1943, except these water tests that you have already mentioned to us; is that correct?

A. That is right, yes.

Q. Do you know the pressure at which the gasoline and the diesel oil were being pumped out of the vessel at the time you left the vessel at about three o'clock on the afternoon of April 23, 1943?

A. No, I don't.

Q. Upon arriving at San Pedro on that maiden voyage and before the diesel oil was loaded at San Pedro where did the vessel dock?

A. At the Standard Oil dock.

Q. Was it at that dock all of the time that it was in the inner harbor at San Pedro on that occasion?

A. I think we were alongside the degaussing dock first.

(Discussion by counsel off the record.)

(Libelant's Exhibit No. 12)

A. (Continuing) Yes, that is right, we were tied up at the degaussing dock first.

Q. And where is that degaussing dock located?

A. In San Pedro.

Q. Is it in the inner harbor?

A. Yes, it is Pier 92.

(Discussion by counsel off the record.)

A. (Continuing) I mean, it is Berth 92.

Q. And you had the degaussing attended to, and then did the vessel go immediately to the Standard Oil dock for the loading of diesel oil? A. That is right.

Q. Was this vessel called the Bald Butte; was that a tanker? A. That is right, yes.

Q. Was it a tanker operated by the Keystone Shipping Company?

A. It was the Pennsylvania Shipping Company then.

Q. And that name was later changed to the Keystone Shipping Company, according to your understanding?

A. That is right.

Q. And now when you first joined the vessel about April 1, 1943, I think you said that Arthur Morris and Axel Danielson were at Portland, also? A. Yes.

Q. Were Messrs. Hardy and Thoren there at that time? A. They came later.

Q. When did they join the vessel?

A. About the 6th or 7th of April; I am not sure which.

Q. Have you anything in this material which you have given us here today that would give us when they joined this vessel?

A. No, but it was while she was in the shipyards.

(Libelant's Exhibit No. 12)

Q. Well, how long before the vessel was delivered by the builders did they join the vessel?

A. That I don't know.

Q. Do you know whether or not they spent any time on board the vessel before the vessel was delivered by the builders?

A. Oh, yes.

Q. They did?

A. Yes.

Q. Do you know how much time they spent on it?

A. No, I do not; but I know they were down there.

Q. Now this vessel was delivered by the builders about April 10, 1943?

A. That is right.

Q. Were Messrs. Hardy and Thoren on the vessel during that trial run to Astoria?

A. I don't know. I know the mate and the second mate were, but I don't remember about the other two.

Q. Now after this contaminated cargo was discharged at El Segundo on May 1 and 2, 1943, and before the vessel started on that voyage upon which it carried the two kinds of gasoline, was there any change in the ship's officers?

A. Yes, sir.

Q. What was that change?

A. The chief mate was released, Mr. Morris.

Q. When was he released; was it after the vessel had discharged at El Segundo?

A. No, sir, it was at Point Wells.

Q. Oh, he was released at Point Wells before the vessel started back to El Segundo?

A. Yes.

Q. Then he must have been released about April 24 or April 25, along in there?

A. About the 25th, I think it was.

Q. Was he discharged?

A. Yes.

(Libelant's Exhibit No. 12)

Q. Was he discharged for any reason connected with this contamination?

A. Yes, that was the reason he was released.

Q. Was he discharged because he was the chief officer left in charge at the time the contamination occurred?

A. Well, I don't know how to answer that.

Mr. Mack: That might call for his conclusion.

(Discussion by counsel off the record.)

Mr. Hall: Q. Was he discharged because of this contamination which had occurred?

A. He was discharged as a result of the contamination. I will put it that way.

Q. Well, you discharged him, didn't you?

A. Well, yes, I did.

Q. Under instructions? A. That is right.

Q. Now did you at the time you discharged him tell him why you were discharging him?

A. Well, he knew he was being discharged, anyway, and there was no reason to tell him; he expected it.

Q. But you must have given him some reason, didn't you, for firing him?

A. No, there was no reason given. I told him he was being fired and he expected it.

Q. Well, how do you know that he expected it?

A. Well, he told me.

Q. He told you that he had been expecting it?

A. Surely.

(Discussion by counsel off the record.)

Q. Now after this contamination occurred at Point Wells were there any other exchanges made in the ship's officers before the vessel sailed back to El Segundo?

(Libelant's Exhibit No. 12)

A. Yes, we made Mr. Danielson chief mate and Mr. Thoren went as second mate and Mr. Hardy went as senior third mate and we got a new junior third mate.

Q. Now after the vessel had loaded this double cargo of gasoline after May 2, 1943, was there any further change in the officers of the vessel before that voyage commenced?

A. No, sir.

Q. Are you still master of the SS Egg Harbor?

A. No, sir.

Mr. Hall: I believe that is all.

Redirect Examination

By Mr. Mack:

Q. Captain Olsen, I hand you a photostat here of a document which up at the top has the printing "Bill of Lading No. blank," and I will ask you if that is your signature on the bottom there (handing document to witness)?

A. Yes, that is my signature.

(Discussion by counsel off the record.)

Mr. Mack: This document is dated at San Pedro, California, April 17, 1943, and just so we have something to refer to I will offer this as Respondent's Exhibit 10 for identification.

(The document was so marked by the reporter.)

Q. Captain, was this bill of lading signed by you after the diesel had been loaded at San Pedro?

A. Yes; I would say yes.

Q. Do you know who prepared that bill of lading?

A. The Standard Oil people.

Q. Now I will show you another photostat, Captain, bearing the printed words "Bill of Lading No blank," at the top, and dated El Segundo, April 18, 1943, and I will ask you if that is your signature at the bottom there (handing document to witness)?

A. Yes, it is.

(Libelant's Exhibit No. 12)

Q. And that was for the gasoline?

A. That is right.

Q. Did you likewise sign this bill of lading after the vessel had loaded the gasoline at El Segundo?

A. That is right.

Mr. Mack: I will offer this document and ask that it be marked as Respondent's Exhibit 11 for identification.

(The document was so marked by the reporter.)

Q. Do you know who prepared this bill of lading?

A. The Standard Oil people.

Mr. Hall: My records show the fact that those are the same documents that are referred to in Paragraph 1 of our stipulation of December 6, 1944.

Mr. Mack: Yes, that is right. I believe I have no further questions.

Mr. Hall: That is all.

Witness.

State of California,
County of Los Angeles—ss.

I, W. L. Heathcote, a Notary Public within and for the County of Los Angeles and the State of California, do hereby certify:

That, prior to being examined, the witness named in the foregoing deposition, Lawrence C. Olsen, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That the said deposition was taken down by me in shorthand at the time and place therein named, and thereafter reduced to typewriting under my direction.

(Libelant's Exhibit No. 12)

I further certify that it was stipulated by and between counsel that the signature of the witness to the said deposition be waived, and that it should possess the same force and effect as though read and signed by the said witness.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this third day of January, 1945.

(Seal)

W. L. HEATHCOTE

Notary Public in and for Los Angeles County,
State of California.

[Endorsed]: Filed Jan. 22, 1945. Edmund L. Smith, Clerk; by John A. Childress, Deputy Clerk.

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Libs. Exhibit No. 12. Filed Jan. 31, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Mr. Mack: I wish to also have the record show or have it understood that the testimony of Captain Olsen is also introduced in behalf of the respondent.

The Court: It is evidence for both sides, so far as that is concerned except, gentlemen, that the exhibits are not attached to that. I assume they are going to be introduced through other witnesses and referred to. For instance, there is the log that you have referred to and the different [147] logs in there, the rough log and the different kinds of logs, and the other exhibits referred to in the deposition are not in evidence. They were retained by counsel by stipulation that they would be available to both parties.

Mr. Mack: They are here, your Honor, and I don't believe all those documents are relevant. We took the precaution to have them identified by Captain Olsen at the time, but I do expect to introduce the smooth log and the rough log and anything else that seems pertinent, perhaps the ullage sheets too.

The Court: I notice in Captain Olsen's deposition that on direct examination he testified that there were certain tests made, and that under cross examination his information as to the tests was information conveyed to him by the mate. Apparently as I have interpreted the deposition he, himself, did not make the tests and the only information is that given to him by those that were serving under him.

I think also that the log from which information was obtained, at least it seems to me to be a log, should be introduced as to whether there is any record in it. The intimation in the deposition is that there was no notation made in the log on these various tests supposed to have been made under 125 pounds of pressure as they approached San Pedro.

Now, I don't know, not being a seafaring man like you two men that are accustomed to deal in the type of cases, [148] whether a test of that kind would ordinarily be reflected in a log or not.

In other words, the picture as presented here gives us no definite information that these tests that you have been talking about were made.

Mr. Mack: Well, it doesn't show in the log that way, if the court please, but on the other hand not everything that is done on the ship is put in the log.

The Court: I know, but that is something the absence of which might or might not be material, but it seems to

me that the logs that you have referred to here, at least, should be introduced in evidence.

Mr. Mack: I intend to put it in.

Mr. Hall: The only document I had marked at the time of taking Captain Olsen's deposition was the document which is now in evidence as Libelant's Exhibit 9.

The Court: That is the piping arrangement?

Mr. Hall: Yes, your Honor. A stipulation was concluded by counsel in this cause on December 6, 1944. That stipulation is on file and the printed copies of the stipulation in our printed memorandum book, page 5.

I desire to offer in evidence first, this paragraph 1, 2, 3, 4, and 5 of that stipulation.

The Court: Let me find mine. Subsequent events have changed that, have they not?

Mr. Hall: Yes. In justice to the proctors for [149] respondent, I think a change should be made in paragraph 6. I suggest this change, which will make the paragraph read in this way—

The Court: Let us make it as a new stipulation in lieu of paragraph 6.

Mr. Hall: Yes, sir, reading as follows:

"That the portion of the cargo thus carried by said S. S. Egg Harbor to Point Wells * * *"

and here is my addition:

"* * * plus products with which it was mixed in libelant's shore tanks, all of which was subsequently found to be so contaminated as to be unmerchantable and require refinery reprocessing and which was returned to libelant's El Segundo refinery in the S. S. Egg Harbor for reprocessing was: 25,507 barrels of said Standard diesel furnace oil, contaminated with gasoline, and 19,479 barrels of said Standard gasoline, contaminated with Stan-

dard diesel furnace oil. (No stipulation is made herein with respect to the time or times when, or place or places where, said products were ascertained to be contaminated, or with respect to the place or places where said contamination took place.)”

In other words, your Honor, the only change I have made in the paragraph is to insert in the second line of paragraph [150] 6 after the word “Point Wells”—

The Court: I think it is clear.

Mr. Hall: Pardon me, your Honor. Is that satisfactory, Mr. Mack?

Mr. Mack: Yes.

The Court: As to paragraph No. 7, it seems to me that there should be an additional stipulation in computation.

Mr. Hall: I have anticipated that, your Honor, and have prepared an alternative. I want to offer paragraph 7, but this is an alternative.

The Court: Suppose your alternative be submitted subject to verification by counsel for respondent. It seems to me that after you have No. 7 it would be easy to, on the same basis, compute the changed amounts.

Mr. Hall: I have just explained to counsel, your Honor, that the Schedule B which I have just handed him is a recomputation of paragraph 7 of the stipulation, using, however, the smaller quantities and it has been computed in exactly the same way. I am hopeful that counsel will stipulate to that in like manner as he stipulated to No. 7. I want to offer in evidence, however, paragraph 7 of the original stipulation of December 6, 1944.

Mr. Mack: I want to say this, if the court please, that I have done my best to cooperate.

The Court: I think both counsel have cooperated.

Mr. Mack: To cooperate throughout, and the court doesn't [151] know this, although I told Mr. Hall it. I was subject to rather severe criticism from my people about stipulating to No. 7 and I told that to Mr. Hall some time ago, but I think I have got them straightened out on that, so I would like a chance to go over this.

The Court: Certainly. I want to give you a full opportunity to verify it. I think the court, in view of No. 7, if it should find according to your theory, could even compute it. The court might have enough knowledge of arithmetic to be able to compute the same and obtain the same results as are obtained under Schedule B. However, I think you should have an opportunity to verify these figures.

Mr. Hall: Then, so far as my present record goes, it will be understood that paragraph 6 of the original stipulation of December 6, 1944 as I have amended it this morning is in evidence, and that paragraph 7 of such original stipulation is in evidence?

The Court: Yes.

Mr. Hall: Yesterday your Honor asked me for certain figures, which I think I have included in another schedule which I have designated as Schedule A, and which I will hand now to the clerk.

The Court: This is pretty much the same as Schedule B, is it not?

Mr. Hall: Yes. It is simply an illustrative schedule, the data being already in evidence by virtue of stipulation [152] or testimony.

The Court: Is it satisfactory, Mr. Mack, that these two schedules may be admitted in evidence, subject to verification by you as to computations?

Mr. Mack: Yes.

The Court: We will admit these in evidence, then.

The Clerk: Schedule A will be Exhibit 13 and Schedule B will be Exhibit 14 in evidence.

(Thereupon, the documents referred to were marked as Libellant's Exhibits Nos. 13 and 14, respectively, and were received in evidence.)

[LIBELANT'S EXHIBIT NO. 13]

SCHEDULE A

<u>Item</u>	<u>Gasoline</u> <u>(bbls. at 60°)</u>	<u>Diesel</u> <u>(bbls. at 60°)</u>
(1) Products carried by the vessel which were not contaminated and which were run into shore tanks 61 and 41.	55,649	37,802
(2) Products carried by the vessel which were contaminated thereon and run into shore tanks 62 and 8	8,140	23,131
(3) Total products carried by vessel	63,789	60,933
(4) Products already in shore tanks 62 and 8, uncontaminated prior to being mixed with item (2), but contaminated by item (2)	11,339	2,376
(5) Products with respect to which libellant claims damages, being a total of item 2 and item 4	19,479	25,507

(1) Arrived at by subtracting item (2) from item (3)

(2) Arrived at by subtracting item (4) from item (5)

(3) Established by par. 4 of the Dec. 6, 1944 Stipulation

(4) Established by testimony of Fred R. Kilbourn

(5) Established by par. 6 of the Dec. 6, 1944 Stipulation.

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 13. Filed Jan. 31, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

[LIBELANT'S EXHIBIT NO. 14]

SCHEDULE B

Paragraph 7 of the Stipulation of December 6, 1944, assumed libelant to be entitled to damages on account of a contamination of 25,507 bbls. of diesel and 19,479 bbls. of gasoline, i.e., not only on account of the gasoline and diesel commingled in the cargo, but also on account of the uncontaminated gasoline and diesel in the shore tanks which became contaminated by mixture with the contaminated cargo. Libelant contends that this is a correct measure of damages.

If (contrary to libelant's contention above) it be held that damages should be allowed only on account of the gasoline and diesel commingled in the cargo (i.e. 23,131 bbls. of diesel and 8,140 bbls. of gasoline), then libelant's damages would be computed as follows:

Value in merchantable condition at Los Angeles area of part of cargo which was contami- nated	\$54,907.45
Add freight and insurance to Point Wells	9,260.75
	<hr/>
Value in merchantable condition at Point Wells of part of cargo which was contaminated	\$64,168.20
Gross value at Los Angeles area of products salvaged from contaminated part of cargo	\$42,441.80
Deduct handling charges at Point Wells	\$ 335.63

(Libelant's Exhibit No. 14)

Deduct freight and insurance to Los Angeles area	9,116.53	
Deduct reprocessing cost at refinery in Los Angeles area	1,736.00	
	<hr/>	
Total	11,188.16	
	<hr/>	
Net value of products salvaged		31,253.64
		<hr/>
Total damage		\$32,914.56

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 14. Filed Jan. 31, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Mr. Hall: The only other thing I have, your Honor, is this. About October 30th of last year we served interrogatories upon the respondent under Rule 31, and those interrogatories were answered and the document was received in our office January 20th of this year.

The Court: Is that the one that was filed—

Mr. Hall: It is the document that we filed. It is marked "Interrogatories Propounded by Libelant under Admiralty Rule 31."

The Court: Filed in our court on the 22nd, I presume. "Answers of Respondent, United States of America, to Interrogatories Propounded by Libelant under Admiralty Rule 31."

Mr. Hall: Yes, your Honor.

Now, in addition, I desire to offer as an admission on [153] the part of the respondent, one of those interrogatories and the answer thereto. It is interrogatory No. 32 which reads as follows:

"After contamination of the cargo was reported to agents of Keystone Shipping Company on April 23, 1943, at Point Wells, describe fully and give the date and result of all such tests or inspections, if any, as were made at any time thereafter for the purpose of ascertaining the cause or causes of such contamination."

The answer to that interrogatory reads as follows:

"Discharging was stopped immediately. All tank valves were checked at once and found in order. All cross-over valves were checked and found in order except that the No. 5 cross-over valves were found sealed but partly open."

The Court: It may be admitted in evidence.

Mr. Mack: If you want to, it is all right with me to have all the interrogatories and answers go in.

Mr. Hall: No. I would not so stipulate, counsel.

The libelant rests.

Mr. Mack: I have a few questions I want to ask Mr. Kilbourn. I will call him as my own witness. [154]

FRED R. KILBOURN,

called as a witness by and on behalf of the respondents, being first duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Mack:

Q. Mr. Kilbourn, I just want to clear up a few points in my mind, one of which I think is apparent, but I want to be sure it is correct.

Did the Egg Harbor take back these contaminated products southbound to El Segundo? A. They did.

Q. Is my understanding correct that the contents of shore tank No. 8 were pumped back onto the vessel?

A. Yes, the contents of shore tank No. 8 were pumped back into the vessel.

Q. All the contents of shore tank No. 8?

A. Not all the contents. We pumped as far as we could get. I think there was a cubic inch of product left in the tank.

Q. I mean so far as practicable, you pumped all of shore tank 8 back into the vessel?

A. That is right.

Q. Then, is the same true of shore tank No. 61? That was the gasoline tank.

A. Tank 61 was not pumped back. Tank 62 was.
[155]

Q. I am in error. Shore tank 61 was the one that showed all clear? A. Yes, that is right.

Q. Now, were the contents, so far as practicable, of shore tank 62, all pumped back onto the vessel?

A. That is right. It was pumped back onto the Egg Harbor.

(Testimony of Fred R. Kilbourn)

Q. Did the Egg Harbor, to your knowledge, depart southbound? A. It did.

The Court: May I ask a question? Do I understand that the parties are in accord and stipulate that the products as commingled, had no market value at Point Wells, and that the shipping them back to El Segundo for reconditioning in fact lessened the damages, if any?

Mr. Mack: I am not in a position positively to answer that, but I believe Mr. Kilbourn answered that in his testimony yesterday, that that was the case.

Mr. Hall: I will so stipulate that that is the case.

The Court: The only thing is, I don't know what the products were other than at Point Wells. There is nothing in the record to indicate that that was an economic way of handling the picture as it developed. In other words, how does the court know, or how is the record going to bring forth the fact that it wouldn't have been cheaper to have dumped the products at that time rather than bringing them back for [156] reconditioning?

I understand that stipulation 8, or whichever one it is, states that the parties agree on that method of arriving at the damages, and that may be sufficient.

Mr. Mack: We agreed that if witnesses were called by the Standard Oil, they would testify to that. That is what we agreed to.

The Court: In other words, I think it should be brought out very clearly to show that the reconditioning was a more economic method of fixing the damages. In other words, it would be the duty of the parties here to reduce the damages, if possible. For instance, in one stipulation here you have \$49,000.00 prospective damages, and another one \$32,000.

(Testimony of Fred R. Kilbourn)

Now, take, for instance, the \$32,000.00 damage. Were those products that were brought back worth that amount? I think you see my point, do you not?

Mr. Hall: I see your point, your Honor.

Now, yesterday Mr. Kilbourn testified that this mass, after Point Wells, had no market value.

The Court: I understand.

Mr. Hall: Now, we put that with paragraph 7 of the stipulation of December 6, 1944, and we have, if I remember, the stipulation, or in any event testimony from a witness that the facts are as stated in paragraph 7; namely, that this product in an uncontaminated condition at Point Wells had a value of \$101,412.55. [157]

The Court: I had overlooked that. That answers my question.

Q. By Mr. Mack: Reverting to the evening of April 23, Mr. Kilbourn, and the tests that were made by Standard Oil from the samples that were taken from the vessel's tanks, and I believe also shore tank 62, can you fix for us any more definitely than you did the time that those samples were taken? A. I cannot, no.

Q. Can you fix it by means of before or after discharge of the diesel commenced at 9:30 that evening?

The Court: That is when they started to pump the diesel out and cut off the pumping of gasoline at the same time?

Mr. Mack: That is correct, your Honor, when the second discharge of diesel commenced.

The Witness: No. I can't tell you when the definite time was, before or after pumping commenced. To tell the truth, there were samples being taken at all times. We took samples all the time, and my memory is confusing

(Testimony of Fred R. Kilbourn)

to me because no log was made of any time we took samples.

Q. By Mr. Mack: You didn't keep any record of the time?
A. No record at all.

Q. The samples I was interested in particularly were the ones submitted to Laucks by you.

A. Yes. I know the ones you have in mind. [158]

Q. Is my understanding correct that you took samples from the vessel's tanks that evening, and shore tank No. 62, and submitted them to Laucks?
A. Yes.

Q. And then, as to shore tank 8, the sample that you submitted to Laucks was taken the following morning around 8:00 o'clock?

A. Yes, that is right. When I came down in the morning, we took that sample.

Q. And that was after pumping or discharging into shore tank 8 had stopped and diversion had been made to shore tank 41?
A. That is correct.

Q. Now, when the contamination was reported by your gauger about 4:30 on the afternoon of April 23rd in the gasoline, did it occur to you then to hold all pumping until both diesel and gasoline had been checked and tested?

A. No, because the only thing that we knew was contaminated at the time was the gasoline, and we didn't know anything about the diesel being contaminated at all. In fact, I didn't know until the following day. I was greatly surprised that it was contaminated.

Q. The diesel was, to all appearances, all right. Is that it?
A. Yes.

Q. And so far as you could tell, it was all right?
[159] A. Yes.

(Testimony of Fred R. Kilbourn)

Q. After discharge of the diesel alone commenced at 8:30 on the evening of April 23rd, were line samples taken by you or men under your direction every so often?

A. Yes. The gauger took samples every hour all through the night until the diesel was pumped out the following afternoon.

Q. What was his report to you on those samples?

A. Well, everything was all right so far as he was concerned. The diesel looked fine. You can't tell that diesel has a little gasoline in it at all, because so small a quantity will contaminate the diesel and bring the flash point down. So, you couldn't tell by looking at a bottle of diesel whether it is contaminated that way. We were looking to see if it was diesel or gasoline, and that is all we were looking for.

Q. But in all events, you didn't think it was necessary to hold all pumping on both diesel and gasoline until you had samples and had tests completed by Laucks?

A. That is right. We knew the gasoline was off, and that is all we worried about at the time. We didn't even think about the diesel being contaminated. There was no evidence of the diesel being contaminated. Not taking a flash test, we couldn't discover any contamination at that time.

Q. Could you have made the flash test at that time?
[160]

A. No, at that time we could not. We had no equipment to make any flash tests.

Q. Now, reverting to the gasoline, when the pumping or discharging of the gasoline alone was commenced on the evening of April 24, it was pumped for a short

(Testimony of Fred R. Kilbourn)

time from tanks 2, 3 and 4 of the vessel, was it not, until it showed clear? A. That is right.

Q. Then, you switched the gasoline from tanks 62, shore tank 62, into shore tank 61? A. That is right.

Q. Can you tell us approximately how long it was after pumping or discharge of the gasoline alone was started until you switched to shore tank 61?

A. Well, it has to be just a rough estimate. I would have to stop and figure out the pumping time of both and fix other things. There was no exact time taken.

Q. You didn't keep any time?

A. No time on that at all.

Q. What would be your rough estimate?

The Court: We have covered this before. He testified yesterday he didn't keep any record. All these time items are estimates on his part. We have the log of the vessel and that should certainly disclose those things.

Mr. Mack: Well, we don't know what they were doing with their gasoline, your Honor. I wouldn't have any record of where they were pumping their stuff.
[161]

The Court: You can't hand out one cubic foot of clear gasoline and one cubic foot of contaminated gasoline and say, "Well, we are only liable for the contaminated portion."

Mr. Mack: Yes, that is correct. Well, if he can give me a rough estimate or his best guess on that, that will be satisfactory and I will leave it.

The Court: Well, he was asked for a rough estimate before and I don't see why we should take time going over it again. Those questions were asked over and over again yesterday about rough estimates.

Mr. Mack: Very well, your Honor. That is all.

Mr. Hall: That is all.

(Witness excused.)

The Court: Gentlemen, I would like to have Mr. Simonsen take the stand for a moment. I would like to ask him a question.

L. SIMONSEN,

called by the court as a witness, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By the Court:

Q. Mr. Simonsen, in your handling of tankers, is it customary to discharge the products of a tanker that have different products, all at the same time?

A. If you are sure that you have positive protection between products. In other words, if you are blanked off [162] and you are sure that there is no chance for the gas to get into the diesel, you know, mix the products.

Here is my contention. We don't have it, as I said before. We blank them off and make sure so that there is no chance for a mix.

However, if I was ever asked to handle mixed cargoes with valves in between, I would pump one product at a time and then observe the outages on this product that is lying dormant in the tank to see we are not moving any of that product into the product we are discharging, you see. That is good practice, your Honor.

Q. I know, but if the tanker is in proper condition, there should be no mixing, should there?

A. If the tanker is in proper condition?

(Testimony of L. Simonsen)

Q. Yes.

A. You mean if the manifolds are properly—

Q. In other words, if the tanker is built to carry different types of products and if the tanker is in such condition or in proper condition to receive different types of products, then there should be no intermingling?

A. That is right. If the tanker is properly provided. I mean, if the manifolds are properly blinded and blanked off so that there is no possible chance that you could get from one side to the other.

Q. There are supposed to be two separate compartments?

A. Yes, two separate manifolds. [163]

Q. And the practice is to remove the two products at the same time?

A. That is right, sir.

Q. And the purpose is to reload that tanker as quickly as possible and get it on its way?

A. That is correct, yes, sir.

The Court: That is all.

Cross-Examination

By Mr. Hall:

Q. You used the term "our products" and the term "we." Do you mean the Standard Oil Company of California?

Yes, sir.

Q. Just prior to the outbreak of war, how many tankers did Standard Oil Company have operating in California?

A. Now?

Q. Just before war broke out and tankers were taken over by the government, roughly, say.

A. Roughly 20 tankers.

Mr. Hall: That is all, thank you.

The Court: Well, that is all. Any questions? I think the question asked is self-evident, but I wanted something in the record on that.

(Witness excused.)

Mr. Mack: At this time I would like to introduce on behalf of the respondents the smooth log of the Egg Harbor, which was identified by Captain Olsen in his deposition, as [164] Respondents' Exhibit 2, for identification.

Mr. Hall: Pardon me a moment. Have you the rough log there, counsel?

Mr. Mack: Yes.

Mr. Hall: There is one thing I would like to compare.

Mr. Mack: I will put them both in, but—

The Court: It doesn't make much difference because they will not be copied in the record. They are going up in their present form.

Mr. Mack: I am going to introduce both of them. Perhaps I had better introduce each one separately.

The Court: Yes.

Mr. Mack: The smooth log will be Exhibit A and the rough log will be Exhibit B.

The Court: Very well. They may be received.

(The documents referred to were marked as Respondents' Exhibits A and B, respectively, and were received in evidence.)

Mr. Mack: I will introduce the ullage sheet of the Egg Harbor. That indicates the difference from the top of the

tank to the liquid in it, whatever that differential may be for the northbound voyage, the sheet being dated April 23, 1943, and referred to in Captain Olsen's deposition as Exhibit 8 for identification.

The Court: It may be admitted. [165]

(The document referred to was marked as Respondents' Exhibit C, and was received in evidence.)

Mr. Mack: I will also introduce the ullage sheet for the southbound voyage from Point Wells to El Segundo when the cargo of contaminated products was carried, which was identified by Captain Olsen in his deposition as Exhibit 9 for identification. That would be Exhibit D?

The Court: Yes.

(The document referred to was marked as Respondents' Exhibit D, and was received in evidence.)

Mr. Mack: I also want to state that I have all the other exhibits that Captain Olsen identified. I just want to make that statement that I have them here in court, but I don't see any relevant purpose in introducing any of the others, so I don't propose to do it unless opposing counsel wants them in.

Mr. Hall: It will be perfectly satisfactory to us if they remain in court during the trial without further being offered in evidence unless one or the other so desires.

Mr. Mack: Very well. Captain Hogstrom, will you take the stand, please?

K. I. HOGSTROM,

called as a witness by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: K. I. Hogstrom. [166]

Direct Examination

By Mr. Mack:

Q. Captain Hogstrom, what is your business?

A. Port captain for the Keystone Shipping Company.

Q. Do you hold any marine licenses of any kind, Captain?

A. Yes, sir, unlimited master's license.

Q. How long have you held that master marine's license? A. 20 years, sir.

The Court: You are going to have to raise your voice like you do on a ship after you leave port, so we can all hear you.

Q. By Mr. Mack: Speak up just a little, Captain.

Now, Captain, in your experience have you specialized in working with any type of ship, any particular type of ship?

A. Well, since 1925 I have been working with tankers exclusively.

Q. Whereabouts?

A. I was five years master tanker, and then I was loading master, and since 1941 I have been with the Keystone Shipping Company as port captain.

Q. Has your experience been largely on the West Coast of the United States? A. Yes, sir.

(Testimony of K. I. Hogstrom)

Q. What do your duties consist of, Captain, at the present time?

A. Well, mainly to get the personnel of the vessels [167] and also to see that these tankers are properly loaded at the terminals, Wilmington and San Pedro.

Q. Did you attend, Captain, at the loading of the Egg Harbor at San Pedro and El Segundo in April of 1943?

A. Yes, I did.

Q. Will you take a look at the log book, please, Exhibit A for the respondent, and tell us what product was loaded, if any, at San Pedro and when the date was?

A. Well, the product loaded at San Pedro was diesel oil. That was on April 17, 1943.

Q. And did you check the Egg Harbor at San Pedro before the diesel was commenced to be loaded?

A. I did.

Q. Please tell the court what you did.

A. Before the diesel was loaded, the first mate and myself and one quartermaster—the quartermaster opened the valves, that is the No. 5 cross-over valves, two valves, and the master valve on the No. 1 line between 8 and 9 tanks. Those were opened up and then closed down and sealed. We started the cargo, the diesel in 5, 6, 7 and 8.

Those valves were closed and sealed between 8 and 9 and between 4 and 5, and the numbers were taken off the seals which we have a record of.

Q. Captain, did you personally check all the valves on the ship before loading was commenced at San Pedro?

A. Yes, sir. I was in attendance at the checking of [168] the valves.

(Testimony of K. I. Hogstrom)

Q. And by the valves, I am talking about the respective cargo valves. A. Yes, sir.

Q. Now, was loading then commenced at San Pedro?

A. Yes, sir. Loading was commenced in the morning after inspection was made. Loading was commenced, I think, around 6:00 o'clock in the morning.

Q. And the diesel was loaded into tanks 5, 6, 7 and 8, I think you said? A. That is correct.

Q. Captain, in your opinion was that a proper trim of the vessel to load it that way?

A. Yes, sir, it was all right.

Q. And did you know at the time that a further cargo of gasoline was taken on at El Segundo?

A. Yes, I did.

Q. Now, after the diesel was loaded in those four tanks, did the vessel then go around to El Segundo?

A. Yes, sir.

Q. Did you ride it around?

A. No, sir, I did not.

Q. Were you present at El Segundo on the Egg Harbor before loading of gasoline commenced there?

A. Yes, I was.

Q. Now, before loading of gasoline commenced at El [169] Segundo, did you make any further tests or checks of the vessel? A. Yes, we did.

Q. What did you do?

A. Well, being a new tanker, never taking anything for sure, I told the mate to open up the suction valves in the No. 4 and 9 tanks.

Q. Were you present when that was done?

A. I was present and went down in the tanks myself.

(Testimony of K. I. Hogstrom)

Q. You personally went down in the tanks?

A. Yes, sir.

Q. In No. 4 and No. 9 tanks? A. Yes.

Q. Where was the gasoline to be loaded?

A. In No. 1, 2, 3, 4 and 9.

Q. Now, what happened, if anything, when you went down into tanks 4 and 9?

A. Well, after we opened the suction valves, it being a new tanker and being told they tested the valves going down, I was going to make sure there was no leakage of diesel into the tanks we were going to load gasoline in, and therefore I went down myself to inspect them.

Q. Did you find any leakage?

A. No, sir, no sign of any diesel in those tanks.

Q. What would have happened, Captain, if there had been a leakage when those suction valves had been opened? [170]

A. It would have leaked into tank 4 or 9.

Q. Now, after you made that test and had been down in No. 4 and 9 tanks, did you conclude that it was in order to commence loading the gasoline?

A. Yes, sir.

Q. Was loading then commenced? A. Yes, sir.

Q. Were you there all during the time loading took place? A. Yes, I was.

Q. Did the vessel then sail after loading of gasoline was completed? A. Yes.

Q. That was on the northbound initial trip to Point Wells? A. That is right, on April 18.

Q. Captain, were you in court here yesterday?

A. No, sir.

(Testimony of K. I. Hogstrom)

Q. There was considerable discussion about the No. 5 and 7 cross-over valves and whether they should be blanked off in handling different grades of cargo.

In your opinion, Captain, based upon your experience, is it required practice to blank off the 5 and 7 valves, the cross-over valves, down in the bottom of the ship when different grades of cargo are carried? A. No, sir.

[171]

Q. Why do you say that?

A. Well, if that was the case, they would make some provision for blanking them off, which there is not. There are two valves to check the crossing of cargo, and if the lines are properly tested, I don't see why there should be any blanked off in those tanks. In fact, there is no provision made for it and I don't believe it is the practice to do so. I never saw it done.

Q. Let me ask you this, in all your handling of tankers in your experience, have you blanked off No. 5 and 7 cross-over valves down in the bottom of the ship in cases comparable to this?

Mr. Hall: Just a moment. I don't think the proper foundation for that question has been laid in that it hasn't been shown that the witness was familiar with this particular piping arrangement in any other vessel.

Q. By Mr. Mack: Well, Captain, are you familiar with the piping arrangements in other tankers?

A. Yes. I wouldn't say all tankers, but most tankers.

Q. How many tankers are you working with at the present time?

A. Well, we have three coastwise tankers on the Coast, and then we have the off-shore ships coming in off

(Testimony of K. I. Hogstrom)

and on practically once every week or so. At the moment, we have one going to load now and one coming in tomorrow.

Q. Right now you are pretty busy in the Harbor. Is [172] that right? A. That is right.

Q. There is in evidence Libelant's Exhibit 9. I will ask you to take a look at that, Captain, and tell us what that is, if you know.

A. Well, this is a plan of a T-2 tanker, a T-2 SCA, which tanker is Swan Island built or some island built tanker, but I believe they have been building at Swan Island for the last two years.

Q. Was the Egg Harbor what is commonly known as a Swan Island tanker? A. Yes, sir.

Q. Are you working with tankers other than Swan Island tankers at the present time? A. Yes, sir.

Q. Do they have a cargo piping plan similar to what is before you? A. No, sir.

Q. Do any of those tankers have what are called "No. 5 and No. 7 cross-over valves" or similar cross-over valves down in the bottom of the ship?

A. No, sir. Some type tankers have, but the ones we have on the Coast haven't. They have what they call a run-around on each end of the ship. Of course you can cross over. There is what you call an equalizing valve.

Q. Captain, in operating these Swan Island tankers, do [173] you blank off the No. 5 and 7 cross-over down in the bottom of the ship in carrying mixed grades of cargo?

A. No, sir. There is no provision made for it.

(Testimony of K. I. Hogstrom)

Q. Well, do you think it is necessary in accordance with good practice to do that?

A. No, I don't believe so. If the line is properly tested with the valves closed, I don't believe it is necessary.

The Court: You are familiar with this recent bulletin put out by the Maritime Commission?

The Witness: Which bulletin is that, your Honor?

The Court: You are familiar with this recent bulletin, are you, referring to Libellant's Exhibit 11 for identification? (Handing document.)

The Witness: Yes, I have read that.

The Court: Would you say that was good practice?

The Witness: That is good practice, yes, sir.

The Court: That's all.

Q. By Mr. Mack: Now, Captain, I am looking at this Circular No. 27, identified as Libellant's Exhibit 11, and it uses the language in here "spectacle or blank flanges provided in the ship's lines."

A. Yes. We have those on the cross-overs on deck and in the pump room.

Q. Now, in the Egg Harbor, were spectacle flanges provided in the pump room cross-overs? [174]

A. Yes, sir.

Q. Were those used on this trip?

A. No, sir, they were open.

Q. Were spectacle or blank flanges provided down in the bottom of Nos. 5 and 7? A. No, sir.

Q. You relied there on the valves?

A. On the two valves, yes, sir.

(Testimony of K. I. Hogstrom)

Q. In carrying different grades of cargo in Swan Island tankers, Captain, have you ever put in blanks or spectacle flanges down in the 5 and 7 cross-overs?

A. No, we never have.

The Court: How many Swan Island tankers have you used?

The Witness: Well, we have, I believe it is around 40 tankers of that type right now.

The Court: 40?

The Witness: Yes. Most of them are operating on the East Coast, but quite a few are operating on this coast, loading at San Pedro and El Segundo.

Q. By Mr. Mack: Captain, were you up at Point Wells during any of the time of the subsequent events?

A. No, sir.

Mr. Mack: You may cross examine.

Cross-Examination

By Mr. Hall:

Q. You mean that the Keystone Shipping Company operates [175] 40 T-2 tankers?

A. I believe so of that type, yes.

Q. How many of the 40 have you become familiar with?

A. Well, I can probably name them. There is the Egg Harbor—

Q. Just tell me approximately how many.

A. Well, oh, I will say seven or eight.

Q. Now, I think you said at San Pedro you at first opened up the valves in the cross-over in No. 5 tank, the cross-over being marked on this plat, Libellant's Exhibit 9, as G. Is that correct?

A. Yes, I opened them up and closed them.

(Testimony of K. I. Hogstrom)

Q. You opened them up and then closed them?

A. Yes, and made sure they were closed.

Q. What else did you open up and then close?

A. The master valves there between 8 and 9 tanks.

Q. Now, will you indicate where that master valve is here? A. 8 and 9—it is on this line here.

Q. If I mark this valve with the letter Q, that would be the valve which you opened up and then closed down?

A. Closed down and sealed.

Q. Now, did you open up and close anything else?

A. No, not on deck. We opened up, after we started unloading, we opened up the suction valves.

Q. Now, let me get this clear. At San Pedro you [176] didn't open up and close anything else than these valves in G, and the valve which you have marked Q. Is that right? A. Yes.

Q. Now, you said, I think, in your testimony, that you checked all the cargo valves on the ship?

A. Well, we checked them. There is no reason for checking except when you load the ship you open up your suction valves and check to see that the cargo is coming in.

Q. By "check" you mean you went around and looked at them? A. Yes.

Q. You didn't do anything more than that?

A. I watched the men do that.

Q. What did you observe them do?

A. Turn the valves.

Q. All the valves?

A. It is not necessary to turn every valve on the deck.

Q. Now, I am going to leave out for the moment these valves which are on the cross-over G and the valve G. You said you checked all the other valves on the ship.

(Testimony of K. I. Hogstrom)

I am asking you if you did anything more than look at those valves and see what position they were in?

A. Well, after checking those valves and sealing them, then we opened up the suction valves and the Nos. 5, 6, 7 and 8 to load the cargo.

Q. Did you check or do anything with any other valves [177] than those that are on the cross-over marked G, the valve Q, and the suction valves you have mentioned?

A. Yes. There is a drop valve. I think the cargo was loaded down through the 5 drop valve, and then through suction into the tank.

Q. Now, you said that after the diesel cargo was loaded at San Pedro you went down into the center tank and looked to see—

A. Not to San Pedro. I didn't say that.

Q. What did you say about going down into a tank to see if there was a leak?

A. At El Segundo before loading the gasoline.

Q. Pardon me. At that time when you went down into that tank, it was at El Segundo? A. Yes.

Q. And the diesel had already been loaded, but you had not yet loaded the gasoline? A. Yes.

Q. What tank did you go into?

A. Nos. 4 and 9.

Q. All right. Take No. 4 tank. What did you look at? Did you go clear to the bottom of the tank?

A. Yes.

Q. What did you look at when you got to the bottom of No. 4 tank?

A. At the suction to see if there was any leak. [178]

(Testimony of K. I. Hogstrom)

Q. Will you mark the suction that you looked at? We will give it the letter R. Will you mark an "R" on the suction you looked at?

A. Here (indicating).

Q. Now, where you have indicated, I will put the letter R.

A. Both those valves, one there and one here.

Q. We will put R there and R-1, and we will put R-2. Now, what did you look at on that occasion?

A. I looked underneath this to see if there was any sign of diesel underneath there.

Q. That is at R. What else did you do?

A. Then, I came up on deck.

Q. Did you do anything with respect to R-1 and R-2?

A. Well, they were closed again. There was no diesel found down below, and they were closed again.

Q. You mean you closed them at that time?

A. Yes, and then they were opened up later on.

Q. Did you check any other valves or bell mouths, as you call them, in tank 4? A. No, just one.

Q. You didn't go in the center tank at all?

A. No.

Q. You didn't go into the port tank?

A. No, sir. I looked down from the top, but I couldn't see anything. [179]

Q. Now, going to tank 9— A. Yes.

Q. Did you go down to the bottom of No. 9 tank?

A. Yes, down to the bottom of 9 tank.

Q. What did you look at there?

A. At the same thing. We opened those two valves on here on this line, these two right there (indicating).

(Testimony of K. I. Hogstrom)

Q. We will mark those two valves that you have just referred to as "S", and we will mark the bell mouth as "S-1."

Now, then, what did you look at?

A. Under the bell mouth to see if there was any sign of diesel.

Q. And before you did that looking, those valves at S had been opened? A. Yes.

Q. Did you look at any other bell mouths or valves in tank 9? A. No, I did not.

Q. Either starboard or port?

A. I just looked down through the hatch.

Q. But you didn't go down into either the port or starboard tanks in No. 9? A. No, sir.

Q. Now, you take the position that if blanking off had been necessary in these cross-overs in Nos. 5 and 7 tanks, that spectacles would have been provided in those cross-overs [180] in the bottom of the tanks, don't you?

A. If they wanted them blanked off, I should think they would be, yes.

Q. Did you notice that there were spectacles in the cross-overs in the pump room, which have been marked L and M?

A. Yes, sir. They are there, but they were not blanked off.

Q. They were not blanked off on this trip?

A. Not in the pump room.

The Court: Why not?

The Witness: Well, your Honor, the ship just came out of the shipyard and it came down here and I really couldn't say why they were not blanked off down here. They should have been, but they weren't blanked off.

(Testimony of K. I. Hogstrom)

Q. By Mr. Hall: I think you testified that you understood there had been a previous water test or, as you call it, a hydrostatic test?

A. That is what Captain Olsen told me. I asked him if he had made the test of the lines which we always did before loading the cargo.

Q. What you know about that is what Captain Olsen told you?

A. That is right, sir. I believe I asked the first mate if he had tested the line, and he said yes.

Mr. Hall: That is all.

The Court: Captain, I would like to ask you a question. [181]

Of course, you learned afterwards, after the loading of this cargo, that in unloading and pumping from different tanks the product became commingled, did you not?

The Witness: Yes, I heard of it afterwards.

The Court: In other words, in your opinion, what would cause such a condition?

The Witness: Well, of course I wasn't up there, your Honor.

The Court: I know, but you say that everything was tight and it was all in separate tanks.

The Witness: Yes, sir.

The Court: Then, unless there was something wrong, when they worked the pump on the gasoline and diesel oil, they would have come out gasoline and diesel oil, would they not?

The Witness: It could be done on the ship discharging or also ashore.

The Court: But I am assuming.

(Testimony of K. I. Hogstrom)

The Witness: Yes.

The Court: I am assuming that they started to unload this vessel at Point Wells and they were pumping from a tank that had gasoline and a tank that had diesel oil.

The Witness: Yes.

The Court: And that at the end of the hose it showed commingling. What would cause such a condition?

The Witness: Well, it could be due to pumping two cargoes at one time and by an unequal pressure if there was a [182] leak in the valve somewhere. I mean the discharge valve, not the suction valve.

The Court: There had to be a leak some place?

The Witness: Yes.

The Court: It couldn't have gotten together unless there was a leak some place?

The Witness: That is right.

The Court: That is all.

Q. By Mr. Hall: Did this opening and the closing of the valves in the cross-over on G and also the opening and closing of the valve at Q occur just before you loaded the diesel at San Pedro?

A. Will you say that again?

Q. Did it occur just before you loaded the diesel at San Pedro?

A. I don't quite understand you.

Mr. Hall: Will you read that question?

(Question read.)

The Witness: Yes, sir.

The Court: Will you point out on this where the cross-over valve No. 5 is?

(Testimony of K. I. Hogstrom)

The Witness: Right here. There is one cross-over here and one there. That is between the middle line and the starboard line.

The Court: Well, assuming that at arrival at Point Wells all cross-over valves were checked and found in order [183] except that No. 5 cross-over valves were found sealed but partly open, what effect if any would that have?

The Witness: Well, if that was the case, your Honor, that valve must have been opened up on the way going north because I was there personally and watched them turn the valves. They opened the valve and turned it down tight.

The Court: What effect would that have? Would that account for the commingling here?

The Witness: It probably would if there was a leak.

The Court: That is all.

Re-Direct Examination

By Mr. Mack:

Q. Captain, were any samples taken of the diesel in the vessel's tanks at San Pedro by the vessel?

A. No, sir.

Q. Or anybody on it before or after it had been loaded?

A. No. The samples were taken by the Standard Oil gauger. The gauger took the samples and we were given an O.K.

Q. The Standard gave you an O.K. on the cargo?

A. Yes.

(Testimony of K. I. Hogstrom)

Q. Now, at El Segundo did you or anybody whatever on the vessel take any samples of the gasoline after it had been loaded in the tanks? A. No, sir.

Q. You relied again there on the Standard Oil? [184]

A. Well, I don't recall whether Standard Oil took samples up there. I couldn't say that.

Q. Now, when you checked in No. 4 tank at El Segundo before loading of gasoline was commenced, did you check in tanks 3 and 2 as well?

A. No, because the same pipe line runs through these tanks. The 3 or starboard pipe line takes in 1, 2, 3 and 4 tanks. By opening one suction valve, if there wasn't any leak in that, there wouldn't be in the others. That is close to the No. 5 tank, and if the ship had a stern drag, it would come in there first.

Q. That was customary practice to check as you did at both San Pedro and El Segundo?

A. Well, I wouldn't say it is customary. I do it for my own satisfaction, just to satisfy myself there are no leaks, although they said the pipe lines were checked.

Mr. Mack: That is all.

Mr. Hall: That is all.

The Court: That is all.

(Witness excused.)

Mr. Mack: May Captain Hogstrom be excused? He is busy down at the Harbor with several tankers.

The Court: So far as the court is concerned, he may be excused.

Mr. Hall: Yes.

Mr. Mack: I will call Mr. Hicks. [185]

R. J. HICKS,

called as a witness by and on behalf of the respondent, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: R. J. Hicks.

Direct Examination

By Mr. Mack:

Q. Mr. Hicks, what is your business?

A. I am assistant port engineer for the Keystone Shipping Company.

Q. Do you hold any marine license, Mr. Hicks?

A. Chief engineer.

Q. How long have you held a chief engineer's license?

A. About 14 years or 15 years.

Q. Now, in your work have you dealt particularly with any type of vessel?

A. Well, most of the time with tankers.

Q. How long have you been working with tankers?

A. I would say altogether 20 years.

Q. Have you sailed on tankers? A. Yes, sir.

Q. How long did you sail on tankers?

A. About 13 or 14 years.

Q. How long have you been doing shore work?

A. Since 1937.

Q. And what are your duties? [186]

A. Well, the upkeep of the ship, loading and discharging of ships.

Q. Now, were you up at Point Wells, Washington, when the Egg Harbor arrived here on the early morning of April 23, 1943? A. I was.

Q. Were you on the dock waiting for her to come in?

A. Yes, sir.

(Testimony of R. J. Hicks)

Q. Before that time, Mr. Hicks, had you been on the Egg Harbor at any time?

A. I have been on it several times.

Q. Where was that?

A. When she was being built by Kaiser at Swan Island.

Q. Were you down on the vessel just before delivery was taken?

A. Well, I couldn't say how many days, but probably two or three days.

Q. And that was while she was still at the Swan Island yard? A. Yes.

Q. Did you go on the trial run of the vessel?

A. No, sir.

Q. When you were there at the Swan Island yard, was Captain Olsen on board? A. Yes, he was.

Q. Were any of the mates on board? [187]

A. They were all there.

Q. Were all the mates licensed officers?

A. Yes, sir.

Q. Had any of the mates, to your knowledge, had any prior experience with tankers?

A. Two that I know of.

Q. Who? A. The first mate and second mate.

Q. Now, Mr. Hicks, getting back to Point Wells again, when the vessel arrived there, what type of weather was it at the time?

A. It wasn't very bad when it first arrived but at 8:00 o'clock a very strong wind came up.

Q. Did that delay discharging operations?

A. It delayed the start of it.

(Testimony of R. J. Hicks)

Q. Were you on board or on the vessel up to the time discharging commenced?

A. I don't think I came on there until about noon because it was so rough. I couldn't get the boat tied up close enough to the dock.

Q. When the vessel got close enough to the dock to tie up, you then boarded her? A. Yes.

Q. What did you do?

A. I stayed until they started discharging.

Q. Did you go over any of those valves or check any of [188] the piping? A. No, sir.

Q. Will you take a look at the log there and tell us when discharging commenced?

A. Discharging commenced at 1:50 on gasoline, 1:50 p. m. on the 23rd.

Q. When did discharge commence on the diesel?

A. 2:23 p. m.

Q. So that when the diesel was discharged, the two products were going over the side at the same time?

A. That is right.

Q. Now, is it customary in tanker operations to carry different grades of cargo? A. It is.

Q. Mr. Hicks, after discharging commenced, what did you then do?

A. I had to go to Seattle to make a telephone call.

Q. That was on business relating to the company?

A. Yes.

Q. And what did you next hear about or do with reference to the Egg Harbor?

A. Well, as near as I can remember, about 5:00 o'clock I got a call that they had contamination and they had stopped discharging.

(Testimony of R. J. Hicks)

Q. Do you know who that call was from?

A. No, I don't remember who the call was from. [189]

Q. Did you then come back to the Egg Harbor?

A. I did.

Q. How far was it from Seattle to Point Wells?

A. Oh, approximately 15 miles.

Q. When did you get back to Point Wells then?

A. I don't remember the exact time. It was around 6:00 or a little after.

Q. When you got back, did you go on board the Egg Harbor? A. At once.

Q. When you arrived back there, did you have any discussion with any representatives of the Standard Oil Company, either Mr. Kilbourn, Mr. Simonsen, or anybody else?

A. I think I talked to both of them.

Q. Was that before you boarded the ship?

A. No. I think it was after I boarded the ship.

Q. And came back off? A. Yes.

Q. All right. When you boarded the ship, what did you do?

A. Well, I asked the second mate who was on watch what was wrong, and he said he didn't know, and I said, "Let's check the valves," which we did.

Q. Did you then check the valves? A. Yes.

Q. What did you find? [190]

A. We found all of them in order except the cross-overs in No. 5 tank and they were slightly open.

The Court: Were the seals broken?

The Witness: No, sir, they were not.

(Testimony of R. J. Hicks)

Q. By Mr. Mack: When you say slightly open, tell us what you mean by that.

A. Well, they may have been open four or five turns. You couldn't tell. I didn't close them myself. One of the quartermasters closed them.

Q. When you found the No. 5 cross-overs slightly open, did you order them closed? A. Yes, sir.

Q. Were they closed in your presence? A. Yes.

Q. Was a wrench used? A. No.

Q. Is it necessary to use a wrench to close them?

A. Well, I don't think so.

The Court: Don't they have wheels on them that you use as leverage to turn them?

The Witness: Yes, the wheels are about 15 inches in diameter.

Q. By Mr. Mack: Now, when you found those—when you first saw the No. 5 cross-over valves, they were sealed, you say? A. That is right. [191]

Mr. Mack: Does the court understand what that seal business is? I am frank to say I didn't at first.

The Court: What?

Mr. Mack: Is it clear to the court what this seal business is? I can have Mr. Hicks draw a diagram. I didn't understand it at first.

The Court: I don't know what you are talking about now.

Mr. Mack: The seals on the No. 5.

The Court: Oh, yes. I think I understand. You might see if I am correct, Mr. Witness, that when the valves are set, the wheels are chained together.

The Witness: In most cases they are, because you have to have some place to chain them.

(Testimony of R. J. Hicks)

The Court: You lock them in position, and then there is a seal like on a box car to indicate whether or not they have been tampered with?

The Witness: That is right, but these two valves happened to be sealed with two because the wheels were very close together and they used that to interlock them.

The Court: That would indicate that they had been opened at sea during the voyage, would it not?

The Witness: No, the seals were interlocked around each wheel and then put through each other. They were locked like that, you see. Your wheels are about, oh, two inches apart, I guess, on these two valves.

The Court: Well, then, with the seal, the valves still [192] could be loosened?

The Witness: No, sir, very little, not enough to unseat them.

Q. By Mr. Mack: Mr. Hicks, would it be possible during the course of the voyage for somebody to break the seals, move those valves and reseal them?

A. It would.

Q. Now, the same thing would be true if the vessel were in port, would it not? A. It would.

Q. Now, after the No. 5 cross-overs were shut down tight, what did you then do?

A. I think I talked to Mr. Kilbourn and we decided to try pumping again with both grades.

Q. Was pumping resumed then with both grades?

A. We started.

Q. How long did that last?

A. A very few minutes. It was still off.

Q. What was still off? A. The gasoline.

Q. Was pumping then stopped? A. Yes, sir.

(Testimony of R. J. Hicks)

Q. On the vessel? A. That is right.

Q. Now, what happened next, Mr. Hicks?

A. Well, we took samples or rather the Standard Oil [193] took samples, and we waited awhile and decided to start pumping with one grade only, which we did on the diesel.

Q. Let me ask you this while I think of it. Before discharging of any kind was started from the Egg Harbor up there at Point Wells, did the vessel take samples from any of the tanks? A. It did not.

Q. Did the Standard Oil Company take samples from the vessel's tanks? A. They did.

Q. Those are the regular bottle samples?

A. That is right.

Q. And were you given a clearance by the Standard Oil Company that the cargo was in order before you started discharging?

Mr. Hall: Just a moment. I will object to that as calling for a conclusion of the witness.

Mr. Mack: Well, I will reframe the question.

Mr. Hall: No proper foundation has been laid.

Mr. Mack: I will reframe the question.

Q. By Mr. Mack: Were any statements made to you by any representative of the Standard Oil Company about the results of the samples taken?

A. No, sir, they did not. They said—someone came down and said it was all right to start pumping.

Q. Someone from Standard Oil? [194]

A. Yes, sir.

Q. And until that time had you started any discharging from the vessel? A. None whatever.

(Testimony of R. J. Hicks)

Q. Do you know who that was from Standard Oil that told you that?

A. No, I don't remember who it was.

Q. One of the shore men? A. Yes.

Q. Now, was discharge of diesel alone then commenced some time later that evening? A. It was.

Q. Can you refer to the log and tell us the precise time?

The Court: Gentlemen, is there any question about that?

Mr. Mack: I don't believe there is, your Honor.

The Court: Then why go into it? It shows when they started to pump the separate grades it came out all right except the gasoline for just a short time showed a little coloring and then it cleared up.

Mr. Mack: That is right.

The Court: There is no use covering those things that are admitted, Mr. Mack.

Mr. Mack: Very well.

The Court: There is no dispute about it.

Q. By Mr. Mack: Mr. Hicks, were you on board the Egg [195] Harbor all that night? A. Yes.

Q. And after diesel commenced, after pumping of diesel was commenced alone, was any change in any valve or pumping equipment made to your knowledge up to the time discharge of the diesel stopped?

A. None at all.

Q. Did you receive a report at any time on April 23rd that the diesel was off? A. No, sir.

Q. Did you receive a report at a later time from the Standard Oil people that the diesel was off?

A. Yes, sir.

(Testimony of R. J. Hicks)

Q. When was that approximately?

A. That was the next day in the afternoon. I don't remember exactly what time. It was early afternoon.

Q. What did they tell you?

A. They told me that the first diesel we pumped off was off flash.

Q. And they referred to what diesel?

A. Well, it was in the first tank we pumped into, which was later identified as tank No. 8, I think, but I didn't know at the time.

Q. Mr. Hicks, did you go ashore and inspect any of the tanks of the Standard Oil? A. No, sir. [196]

Q. Did you see any of the samples that they took?

A. I just saw them in the bottle, but that is all.

Q. Were you present when any samples were taken from the ship's tanks on the evening of April 23rd?

A. Yes, sir.

Q. Mr. Hicks, relative to the respective density or weight of gasoline and diesel, which is the heavier?

A. Diesel.

Mr. Mack: You may cross examine.

The Court: Ask him what was wrong, what caused the intermingling of those products.

The Witness: I really don't know.

The Court: Well, afterwards the Egg Harbor made another voyage up there, another trip?

The Witness: That is right.

The Court: With mixed cargo?

The Witness: I think it did. I am not positive what cargo she had at that time, but I think it did have two grades at that time.

The Court: They didn't have any trouble that time?

(Testimony of R. J. Hicks)

The Witness: No.

The Court: You did have trouble—

The Witness: The first time.

The Court: And you were never able to determine what was the cause of it?

The Witness: No, sir. [197]

The Court: You knew something was wrong?

The Witness: Something was wrong, that is right.

The Court: In other words, if there had not been anything wrong, there wouldn't be any commingling?

The Witness: No.

The Court: That is all.

Mr. Mack: That is all.

Mr. Hall: That is all.

(Witness excused.)

Mr. Mack: Now, if the court please, I have one more witness, but he is not here.

The Court: That gives me a good excuse to take an early recess.

Mr. Mack: I want to say this, your Honor. In these ship cases we have an awful hard time with our witnesses. The men are scattered all over and I have been unable to locate the other mates. I wanted them here.

I located the second mate on the vessel Fort Stanley, but it is at sea. However, the chief pump man, Mr. Hilligos, is due in here tomorrow noon on a ship, and I was wondering if it would be agreeable to the court and opposing counsel if we could adjourn until, say, Friday morning, until we could get him up here and hear his story.

The Court: The court's calendar is such that I can do it if it matters.

Mr. Hall: Would it be possible for you to suggest a [198] possible stipulation as to what he might testify to? The reason I ask is that I am holding people here from Seattle, and I don't like to let them go until the case is over.

Mr. Mack: I think I heard Mr. Kilbourn say this morning that he expected to be here a couple of days.

The Court: You should not have been listening.

Mr. Mack: That's right. Well, as I understand it now, Mr. Hilligoss will testify that when the vessel arrived at Point Wells, he personally checked and set all the valves including the No. 5 cross-over, and that all the valves were tight and set; that he then left the vessel after discharging. I am not clear on this, whether he left the vessel before discharging commenced or after and then later returned.

The Court: Does he know what caused this intermingling?

Mr. Mack: No, he doesn't.

The Court: What is his testimony going to add?

Mr. Mack: The only thing that his testimony would add would be that it would account for what he, as chief pump man, was doing.

The Court: Any pump man will testify that he did everything that was possible and that everything was in order. A man is going to do that for his own protection. It is usually recognized that the crew of a boat will remain loyal to the ship.

I think if that is all he is going to testify to, that you should be able to stipulate that if he was present he

[199] would testify that he set all the valves. Would that answer your purpose?

Mr. Mack: Set all valves, checked them, and closed them.

The Court: You must recognize, counsel, that there is something wrong.

Mr. Mack: That is right, your Honor, and frankly—

The Court: And the burden is on you.

Mr. Mack: Yes, the burden is on me as representative of the ship and its operators to present what we know about the case.

The Court: Somebody is holding out something, counsel, some place along the line because somebody, some place, has determined the cause of this commingling, and those that had charge or custody of the vessel were in a better position to ascertain and learn the cause.

Mr. Mack: I agree with you, your Honor.

The Court: Would you stipulate that if this pumper were present he would stipulate as Mr. Mack has outlined?

Mr. Hall: Well, might we do this, your Honor? I know you want a recess. Maybe we could go over the noon hour and it might be that at 2:00 o'clock we will have that.

The Court: Do you have any other witnesses this afternoon?

Mr. Mack: No, your Honor.

The Court: We will take a recess until 2:15, gentlemen. [200]

Mr. Mack: Very well.

(Thereupon, at 12:00 o'clock noon a recess was taken until 2:15 o'clock p. m.) [201]

Los Angeles, California, Wednesday, January 31, 1945. 2:15 p. m.

The Court: Proceed, gentlemen.

Mr. Mack: If the court please, I have prepared a brief sketch of what Mr. Hilligoss would testify to according to the information I had but Mr. Hall didn't feel he could stipulate to it, so I would propose, if agreeable to the court, that I will get in touch with the agents of the vessel that Mr. Hilligoss is expected to come in on and if by any chance it comes in earlier than the expected time—

The Court: Is there any objection to going over, Mr. Hall?

Mr. Hall: No, your Honor.

Mr. Mack: I could perhaps get the man up here tomorrow afternoon if the boat gets in on time. Otherwise, I would suggest Friday morning.

The Court: The clerk tells me that I have something on Friday morning. I have a pre-trial in a patent case. I will probably finish with that in the morning. It might be that you could get your witness here tomorrow afternoon?

Mr. Mack: That is right. If I can, I will. I hesitate to make any definite statement because I have seen it happen when a boat is supposed to come in and gets in later. Usually it is earlier.

Mr. Hall: I am perfectly agreeable to coming up any time counsel may call me if that is agreeable to the court. [202]

The Court: I think we should make an order of continuance until Friday at 2:00 o'clock with the reservation that if counsel can agree on an earlier hour or some time

Thursday afternoon, they shall get in touch with me and I think it can be arranged.

Mr. Mack: Very well, your Honor. May I ask Mr. Hicks about two more questions, please?

The Court: Yes.

R. J. HICKS,

recalled as a witness by and on behalf of the respondent, resumed the stand and testified further as follows:

Direct Examination

(continued.)

Q. By Mr. Mack: Mr. Hicks, when discharge of the diesel alone was commenced at 9:30 on the evening of April 23rd, was the diesel discharged at a constant rate until discharge was concluded the following day?

A. It was probably, after the first half hour of discharge and before the first hour of finishing.

Q. And what would be the differential in the first half hour and the last finishing hour?

A. Oh, a couple of hundred barrels an hour.

Mr. Mack: I think that is all.

Mr. Hall: No questions.

(Witness excused.)

The Court: Have either one of you any evidence besides the testimony we are waiting for? [203]

Mr. Mack: I have none, your Honor.

Mr. Hall: There is one question that I don't know whether it calls for comment or not, your Honor. Paragraph 34 of the Charter Party reads as follows:

"Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder."

May I inquire whether your Honor, in the event there is a judgment ordered for the libelant, would fix attorney fees without proof of the services the attorneys have performed, or whether your Honor will desire proof or some statement along that line?

The Court: Well, I have never had that situation presented to me in this way. As I understand the rule, though, and I am not sure I am correct, it is that when the court has heard the evidence and has observed the services of counsel, that the court can then proceed to fix the attorney fees. Now, if counsel desire to offer any evidence as to the time that this case has required outside of the court room, and of course I realize from the briefs that there has been considerable research work done on this case, why, I would have no objection to the introduction of that evidence.

However, I presume that counsel, on account of representing opposing interests, could agree on what is a reasonable attorney fee, if it wasn't for the fact that they were [204] binding their principal, and particularly in view of the fact that the United States is a party here, I presume it might be better to offer some evidence so that we will at least have something in the record.

Mr. Hall: Very well. I will prepare a statement of that kind or be prepared with something of that sort at the next session.

Mr. Mack: I wasn't aware that a claim of that kind was being made, and of course there is no specific allegation of that in the libel unless it is under the broad prayer there.

Mr. Hall: The prayer is very broad and also, as I understand the rule in Admiralty the court is very liberal with respect to matters prayed for. There might be

recovery in excess of the amount prayed for in Admiralty.

The Court: I understand the court can allow amendments to comply with the proof too.

Mr. Mack: That is right. There is no doubt about the rule being a broad one.

The Court: Mr. Hall, I am asking some questions now because it seems to me that the case has been pretty well briefed and I doubt whether there is much more than can be submitted to the court in the way of law except on this question as to whether the respondent is liable for the contaminated products in their own tanks. I was wondering if, while you have asked for it all, whether, in view of paragraph 7, you still maintain that position. [205]

Mr. Hall: Yes, your Honor. Your Honor has had an opportunity, I assume, to examine our reply brief that came in three days ago on this damage point?

The Court: Yes.

Mr. Hall: Now, turning to paragraph 7 of this Charter Party, our position is this. The only sentence, I think, in the paragraph which is pertinent to the present inquiry, is the first sentence which reads as follows:

“The cargo shall be pumped into the vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the vessel at the expense of the vessel, but at the risk and peril of the vessel only so far as the vessel’s permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its consignee.”

The purpose of that is obviously to limit the time and place where the vessel will be liable for a breach. In the case at bar we take the position that the breach occurred

on the vessel, and we believe we have proved that the breach occurred on the vessel. In other words, the commingling occurred on the vessel. Therefore, having proved that the breach occurred on the vessel, we have satisfied that sentence of paragraph 7. We bring ourselves within that sentence. The vessel is liable for the contamination.

Now, the next question is, what are the damages which we [206] are entitled to as a result of that contamination? The breach having occurred where this paragraph says the breach must have occurred in order for us to recover, we then have the further question as to the amount of damages which should be recovered, and there the cases cited in that recent memorandum of mine become important.

There, I show that it would be a reasonable anticipation by anybody connected with the tanker business that these products would have to go into a shore tank, and it would be foolish to assume that that shore tank would be an empty tank. It might just as well be a full tank or a partly full tank for this product to go into, and therefore it would be reasonably anticipated that the breach which occurred upon the vessel would have its repercussion in damages upon the shore.

The Court: There wouldn't be any question in the court's mind in that respect if it wasn't for the language of Article 7, because it is their libel through the Charter Party agreement.

Mr. Hall: Now, if your Honor please, I don't think there was any such evidence.

The Court: There has been testimony to the effect that the Charter Party drawn by the Standard Oil—of course, I recognize that it states here that it is a form.

Mr. Hall: Oh, no. This Charter is prescribed under the rules and regulations of the War Shipping Board. We couldn't possibly have prepared this Charter. I think Mr. [207] Mack will bear me out on that. The things that were prepared here, or filled in, your Honor is thinking of the bills of lading which were filled in by the master in San Pedro, but not the master charter.

The Court: I am discussing this a little bit because I would like, when we finish Friday, that the case stand submitted without asking for further briefs because counsel have spent considerable time and effort in that respect and have very thoroughly prepared the subject.

However, paragraph 7 reads:

"The cargo shall be pumped into the vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the vessel at the expense of the vessel, but at the risk and peril of the vessel only so far as the vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its consignee."

Now, that looks to me as though that is a definite limitation of the liability of the vessel; that after it leaves the hose of the vessel, what the shipper does with the oil is no longer a responsibility of the vessel, and the fact that the Standard Oil officials or inspectors were constantly testing at that point would bear that out, that they were assuming their responsibility.

Now, under this setup it might ship in a few hundred [208] barrels of oil and destroy a million barrels, or a whole tank, and it seems to me that that section has been inserted in there to limit the liability of the ship to the cargo itself.

Ordinarily a product that is shipped is not commingled with another product. In other words, it might be bales

of cotton. If it was destroyed or injured, the liability would be limited to the injury or destruction of that particular cargo, and the usual measuring of damages has been fixed as the value of the cargo itself. Of course, I realize there are exceptional cases, and those you mentioned in your supplemental reply brief.

Mr. Hall: May I put it this way, if your Honor please. This sentence deals with damage to the cargo. If the damage occurs on the vessel, the vessel is liable for that damage. If the damage to the cargo here had occurred after the cargo had reached the shore, the vessel would not be liable for the damage.

Now, we have in this case the first instance. We have the damage on the vessel. That is as far as this sentence goes. The sentence is put in here to determine when the damage must occur for which you can recover for the damage to the cargo.

The cargo being damaged on the vessel, then the question arises as to what, if any, further damages were directly caused by that breach, and we turn to this paragraph 34 which must be read with paragraph 7: "Damages for breach of this [209] Charter shall include all provable damages."

Suppose that the vessel had tied up at the wharf and through the negligence of someone on the vessel, the Standard Oil gasoline had caught fire. Certainly the vessel's owners would be liable for that negligence, and when you came to the determining of the damages, they would be liable not only for the loss incurred on the vessel, but if the fire spread to the shore and the shore tanks, they would be liable for that damage and so, we say here, that the breach having occurred where it did, where it must have to enable us to recover at all under paragraph

7, the next question under paragraph 34 is: What were the damages which reasonably and naturally ensued from the breach which did occur on the vessel, and those damages were certainly to go to the product in the tank already when this product was run into the tank.

The cases I have cited in my memorandum I believe are directly in point on that, and I believe that this was the kind of damage that was contemplated by paragraph 34 here.

The Court: I don't know how they kept this type out of court as long as they have, at least out of the reported decisions.

Mr. Hall: I think I can explain that. It is because before the war, your Honor, these cargoes were carried by the oil companies themselves and when a mixture occurred, the company did not sue itself. However, since the war, the whole tanker business has been changed around and the [210] companies are operating, many of them, as general agents for the government, operating tankers for the government, and the cargo in many cases is no longer owned by the operators of the tankers.

Those damages to the product in the shore tank must be reasonable damages to be included here under the rule of the cases I have cited in my memorandum.

They say the Keystone Company was operating tankers for petroleum products, and to then assume that this tanker might reasonably assume that the products of that tanker would always be delivered into an empty shore tank is just too violent an assumption to be reasonable.

The Court: You gentlemen can get in touch with me when your witness is available, either tomorrow afternoon or Friday afternoon.

Mr. Mack: I want to say, your Honor, that I expect to have a memorandum or a supplemental memorandum on the damages probably by tomorrow, and I can only just say this, as suggested in my brief. Just suppose a situation like this, and I understand from Mr. Kilbourn that diesel oil fumes are detected in but a comparatively small amount of gasoline.

Suppose you have 1,000 gallons of gasoline run off a ship, by mistake contaminated to some degree, and the oil company, having full control of where that was to go, put 100 barrels in a tank holding 50,000 barrels and that contaminated the whole tank. Then, for some reason, they put another 100 barrels in another tank with 50,000 barrels in [211] it, and so on down the line. You would then have a case of 1,000 barrels going off the vessel and contaminating 500,000 barrels, and it does not seem to me that it was ever intended that the vessel would be liable for the 500,000 barrels, especially in view of this clause.

The Court: 36 certainly modifies this, doesn't it? They must be construed together?

Mr. Mack: They must be construed together, that is correct.

The Court: And it must be assumed that oil delivered at the end of a hose is not going to be delivered into a bucket and carried by hand and dumped some other place. It is assumed it is going to be conveyed by a pipe line to some place.

Mr. Mack: Some place within the entire control of the oil company.

The Court: Some place within the control of the oil company. That is the only point of law that is involved in this case right now that is bothering the court. There

may be some others, but that is the only question of law that is bothering me at this time.

Mr. Hall: May I say just this additional word along that line? Your Honor has stressed the point that perhaps adopting the illustration of counsel, if this oil was placed, or 100 barrels of oil was placed with 100,000 barrels, there might have been damage to the whole 100,000. The magnitude [212] of the damage is no consideration as in these warranty cases where seed is sold with a warranty.

Now, that warranty is nothing but a contract obligation that this is a certain kind of seed. The seed passes from the control of the vendor in the seed. It goes into the hands of the purchaser. It goes into the ground, and if something quite different sprouts up, there is a recovery for the damage to the entire crop. [213]

Now, take the case cited in the Restatement of Law, not by me, but—

The Court: The 120 U. S. case?

Mr. Hall: Yes, the difference there was the difference between the price of good clean rags and the price of diseased rags. The diseased rags were sent under the buyer's contract, but came into contact with the buyer's workmen, causing their death or disability, for which the owner was made liable and recovery was permitted.

There was a very much greater damage in magnitude there.

The Court: I realize that, but that case, I think, can be distinguished from this in that there was a latent defect while this defect was one that was sensible of ascertainment or might have been by closer sampling.

Mr. Mack: I think they did the best they could under the practice then prevailing which was to unload this ship as reasonably speedily as possible.

The Court: I know, but the sampling followed about once an hour. I think the testimony was that they sampled twice, but I think the set-up was to sample about once an hour.

Mr. Hall: That is right.

The Court: Now, that meant they only had an opportunity as ascertain what they were getting once an hour. Now, particularly so far as the gasoline is concerned, the moment that there had been any contamination of gasoline, counsel, [214] examination would have brought that out: while with the rags there was disease and it was latent. There was no way of ascertaining it except perhaps with chemical tests. However, this was perceptible to the eye as soon as the color changed.

Mr. Hall: Well, it certainly is not the rule of law that the Standard in this case, the libelant, in the position of the buyer, must be held to take precaution against a breach of contract on the part of the other party. That is not the rule of law. Once the breach has occurred it is our duty to minimize damages, yes, but until the breach has occurred we are under no duty so far as any case that I have been able to find where we must detect a breach on the part of the respondent.

Now, we perhaps did test at the wharf, but there is certainly no rule of law requiring us to test there. We had a right to rely on the faithful performance of this contract by the respondent. As soon as we found out there was contamination, yes, certain duties came in there that we must minimize the damage, but there is no

rule of law requiring us to anticipate a breach or to step out and spend money and time to try to detect a breach.

The Court: Another question occurs to me. It is the rule that the costs are not recoverable against the United States. Do you interpret this provision under which the United States is made a party in this action, that that also constitutes a waiver of costs? [215]

Mr. Hall: I am not prepared on that, your Honor. I am sorry. I know that the statute provides for interest against the United States limited to \$4,000.00, but I don't recall the rule as to costs.

Mr. Kaapcke: I think costs are allowable in the government under this Act.

The Court: I am rather inclined to think so because the government, so far as this proceeding is concerned, is in the same position as the principal party, but I have also in mind the other particular provision of law that costs are not recoverable in a suit against the government.

Mr. Hall: We will look into that. There is one other point mentioned by your Honor yesterday, and as having some possible bearing on that, I would like to cite two additional cases. One of them is Southern District of California, and one of them is a Ninth Circuit case.

These cases are cases that deal with possible doubt as to the cause of the damages as I think we have in the case at bar. The Court resolved the situation in such manner as to say that one thing might have caused this damage and another thing might have caused this damage and both things were under the duty and jurisdiction of the respondent.

The Court: What case is that?

Mr. Hall: The Arakan 11 Fed. (2d) 791. San Rafael Freight & Transfer Company v. Columbia Steel Corporation, 33 Fed. (2d) 895. [216]

Mr. Mack: On the question of interest, if the Court please, even though the statute provides for it, it also provides it is within the discretion of the court as is the usual Admiralty practice.

The Court: Well, of course, the theory upon which interest is allowed is the theory that that is the value of the money that they have been delayed from receiving, and if the libellant is entitled to recover in this case I certainly feel that from April, 1943, until January, 1945, that the respondent hasn't any right to the free use of that money.

Mr. Mack: That is within the Court's discretion. Sometimes they don't award it. I just call that to the Court's attention.

The Court: I think under the type of action where it is possible to definitely ascertain the damages, that is the direct loss.

My thought is, expressing it perhaps in advance, that whatever findings are made in this case, I want the findings to include both theories of damages so that the picture will be complete, and when Judge Denman of the Circuit Court gets hold of this Admiralty case, he will not have to send it back for retrial if he disagrees with the trial court.

This case will be continued on Friday at 2:00 o'clock p. m.

(Whereupon, on Wednesday, January 31, 1945, at 2:45 p. m. an adjournment was taken until Friday, February 2, 1945, at 2:00 o'clock p. m.) [217]

Los Angeles, California, Friday, February 2, 1945.
2:00 p. m.

The Court: You may proceed, gentlemen.

Mr. Mack: If the Court please, Mr. Hilligos is here now, and I would like to put him on. He has just arrived.

The Court: You may proceed.

A. L. HILLIGOS,

a witness called by and on behalf of the respondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: A. L. Hilligos.

Direct Examination

By Mr. Mack:

Q. Mr. Hilligos, have you been present in court during prior sessions of this trial?

The Court: The Court knows he hasn't been. This is the pumper, isn't it?

Mr. Mack: Yes.

The Court: Go right ahead and get to the gist of it.

Mr. Mack: All right.

Q. By Mr. Mack: Mr. Hilligos, what is your business?

A. Well, chief pumping. That is charge of pumping, discharging the cargo, all maintenance of cargo equipment.

Q. Are you a regularly licensed chief pump man, marine chief pump man?

A. Well, it is really not called a license. It is a [219] certificate.

Q. You hold a ticket, as they say? A. Yes.

(Testimony of A. L. Hilligos)

Q. How long have you held the chief pump man's ticket? A. Since 1937.

Q. In going to sea, Mr. Hilligos, have you gone to sea in any particular type of ship?

A. Well, particularly tankers.

Q. How long have you been in the tanker game?

A. Well, I started in 1928 and then off and on tankers and passenger ships, and from 1933 until the present time I was in nothing but tankers.

Q. Is my understanding correct, then, from 1933 down to the present time you have spent all your time on tankers? A. That is right.

Q. From 1933 on, what type of work have you done on tankers? A. Pump man.

Q. Did you ever work for Standard Oil Company?

A. Yes.

Q. Which one was that?

A. Standard Oil of New Jersey.

Q. That was on the East Coast? A. Yes.

Q. How long did you work for them? [220]

A. Well, from 1935 to 1939.

Q. How long have you been on the West Coast?

A. Since 1942.

Q. Since 1942? A. Yes.

Q. Did you just arrive in here late last night from a voyage? A. Yes.

Q. Mr. Hilligos, did you serve in any capacity on the S. S. Egg Harbor in April of 1943?

A. Yes, as chief pump man.

Q. Did you have any second pump man on the vessel?

A. Yes.

Q. Who was that, please? A. Eddy Gittman.

(Testimony of A. L. Hilligos)

Q. How do you spell that? A. G-i-t-t-m-a-n.

Q. Do you know where he is now?

A. In the South Pacific.

Q. How long has he been out there?

A. 11 months.

Q. Did you ride the Egg Harbor south bound from Portland on its initial voyage? A. Yes.

Q. When did that commence, do you remember approximately? [221]

A. I think about the 12th or 13th of April. I think we took it over on the 12th and sailed the 13th.

Q. 1943? A. Yes.

Q. Now, before you sailed, had you been on the Egg Harbor any length of time?

A. Yes. I think it was the 27th of March I left Seattle to go aboard the Egg Harbor.

Q. And from the time that you were on the Egg Harbor up to the time it sailed, what were you doing, just generally?

A. Well, I was checking all the equipment that we maintain in the pump room, and the cargo, the cargo line.

Q. Does your job of chief pump man include any duties relating to installation of valves or making of repairs at sea?

A. Yes, if anything goes wrong or breaks down and we have the equipment, we repair it. On these ships we always take adequate equipment to repair.

Q. Now, on the south bound trip to San Pedro, Mr. Hilligos, do you know whether any hydrostatic or water pressure tests were conducted on the cargo line of the Egg Harbor?

A. Yes. I put one on myself, through the skipper's orders.

(Testimony of A. L. Hilligos)

Q. Will you tell us just what you did? [222]

A. Well, we tested Nos. 1 and 3 lines. That is the port and starboard line. First, we tested the starboard line, put about 125 or 130 pounds pressure with the cross-overs closed, and opened up the suctions on Nos. 5 and 6 tanks. That was to see if there were any leaks. There was absolutely no leaks there.

Then, we put it on No. 1 line, that is port line with cross-over No. 7 closed and the suctions in No. 5 and 6 tank opened, and there was no leak.

Q. Did you go down in ballast?

A. Ballast and the contaminated cargo.

Q. Now, I am talking about the initial voyage from Swan Island to San Pedro.

A. Yes. We went down in ballast.

Q. When you make those tests, do you make them with the tank full of ballast or empty? A. Empty.

Q. Did you personally go down in the vessel's tanks on the Egg Harbor yourself when those tests were made?

A. Yes. I would alternate with my second pump man. I would go down one and he would go down another one.

Q. And with respect to each tank, did you go into the tanks, clear across the two wings of the center?

A. Absolutely.

Q. Now, when you arrived at San Pedro, do you recall what cargo was loaded there? [223]

A. Yes. We took on Standard oil at San Pedro and discharged ballast alongside the dock and loaded diesel oil.

Q. Now, do you remember in which tanks the diesel was loaded?

(Testimony of A. L. Hilligos)

The Court: That is in the record.

Q. By Mr. Mack: Now, after these water pressure tests were concluded and before loading was commenced at San Pedro, did you check the cargo line valves on the Egg Harbor?

A. Absolutely. When I finished pumping ballast, why, I set the valves and then I went over them again with Captain Hogstrom, Port Captain.

Q. With reference to the No. 5 cross-over valve, did you personally set those yourself?

A. Yes. I was right there when they were closed and I sealed them personally.

Q. Were they shut tight?

A. Yes, with wrenches.

Q. Did you seal those personally yourself?

A. Absolutely.

Q. What about the No. 7 cross-overs?

A. The same thing.

Q. Now, Mr. Hilligos, on those Nos. 5 and 7 cross-over valves on the Egg Harbor, is there some kind of an indicator referred to as a "tell-tale"? A. Yes.

Q. Just tell us what that is. [224]

A. Well, it is an arrow that travels on the valve stem and has got marked on it "Shut", "Half", and "Open" in the space about a quarter of an inch apart, and when the valve is shut, why, it is down at the bottom and also near the bottom of the threads, not quite so you can make sure that the tell-tale isn't holding the valve open.

Q. Now, can you tell us approximately how many turns there are on that No. 5 cross-over valve on the Egg Harbor? A. About 28.

(Testimony of A. L. Hilligos)

Q. And if the cross-over valves were open in four or five tanks, can you tell us approximately how far open the valve would be?

A. Well, in four or five tanks, the gate wouldn't be open over a quarter of an inch. Well, I will say a quarter inch at the most because it goes in a recess of anywhere from a half inch to an inch.

Q. In other words, the gate goes down at the bottom of the pipe line into a recess of a half inch to an inch?

A. Yes.

Q. Were you present, Mr. Hilligos, at San Pedro after the diesel had been loaded when any further tests were made?

A. Yes.

Q. What was done then?

A. I and Captain Hogstrom went down in No. 4 tank, down in No. 9 tank, with the valves open to make sure there [225] was no contamination in the cargo. That is general procedure with this company.

Q. Were you down there personally?

A. Yes, I went down with him.

Q. What is the procedure that is followed to check whether there are any leaks?

A. Well, if there is any leaks, you pump it out and open the valves and let some more in to wash out the rust or accumulation underneath the valves to see if we can seat them tight, and we will wash the tank with a hand hose and let the company inspector look at the tank, and if he passes it, why, that is O.K.

Q. Now, when you went down in No. 4 tank, is there some procedure that you used to open some of the valves?

A. The suction valves are wide open, not wide open but enough so that if there is any leak it would show.
[226]

(Testimony of A. L. Hilligos)

Q. When you were in No. 4, if there was a leak from No. 5, it would show in the No. 4. Is that right?

A. Yes.

Q. Now, did you at that time detect any leak when you were down in No. 4 on that occasion? A. No.

Q. I will ask you the same thing with respect to when you were down in No. 9 on that occasion?

A. No.

Q. If there were any leaks from No. 8 into No. 9, it would show. Is that right? A. Yes.

Q. Did you check the tanks clear across, that is, center and two wings in both No. 4 and No. 9?

A. Absolutely.

Q. Now, did you ride the vessel on up to Point Wells, Washington, after you had been at El Segundo?

A. Yes.

Q. And when you arrived at Point Wells, did you do anything with respect to the cargo line valves on the Egg Harbor before discharging operations commenced?

A. Yes. I went over the valves personally with myself and my second pump man. We set all the valves to discharge and then, when we got the valves set, why, we were ready to start discharging when the man on the dock gave us the word to— [227]

Q. Did you, at any time up at Point Wells, personally check the No. 5 cross-overs before discharging commenced?

A. Well, they were still sealed, tight on the chain and sealed, and that is all that could be done so far as checking goes. You couldn't open or close them to see if they were open or closed.

Q. Was the tell-tale down at the bottom?

A. Yes.

(Testimony of A. L. Hilligos)

Q. When you say you set the valves for discharge, what do you mean by that?

A. Well, when you load, you have certain valves open, and when you start to discharge, why, the valves have to be revised. You open some and close the other ones.

Q. In discharging, Mr. Hilligoss, say with reference to the diesel, in tanks 5, 6, 7 and 8, was the discharging from one tank across at a time or from all tanks at the same time? A. One tank across.

Q. So that if I understand you correctly, discharge would be concluded from one tank, and then you would take the next tank and so on. Is that right?

A. Yes.

Q. Is that the way discharging was done with reference to the gasoline likewise? A. That is right.
[228]

Q. Now, did you leave the vessel, Mr. Hilligoss, up there at Point Wells during the discharging operations or before?

A. I left before. We had a little blow going in there and when we got the gangway out, why I left the vessel.

Q. About what time was that, would you say?

A. Oh, about 11:00 or 12:00 o'clock.

Q. Were you living in Seattle at the time?

A. Yes.

Q. Did you go over to see your people?

A. Yes, sir.

Q. Now, whom did you leave in charge of the pumping? A. My second pump man.

Q. With respect to your second pump man, Mr. Gittman, I think you called him, had he, to your knowledge, had any prior experience in pumping on tankers?

(Testimony of A. L. Hilligos)

A. Yes, approximately two years on another ship with me.

Q. Had he been right with you for two years on another vessel? A. Yes.

Q. Now, did you return to the Egg Harbor any time later that same day?

A. Yes, about 6:00 o'clock in the evening, why, Bob Hicks called me up and told me to come back to the ship and said there was contamination and he wanted me down there. [229]

Q. Did you then return to the Egg Harbor?

A. Yes.

Q. Did you go there from your people's place in Seattle to the vessel?

A. Yes. Just as soon as they called, why, I left. I got a taxicab and went right out to the dock.

Q. When you arrived there, whom did you see at the vessel?

A. Bob Hicks was there and those two gentlemen there.

Q. Indicating Mr. Simonsen and Mr. Kilbourn here in the court room? A. Yes.

Q. Did you at that time or at any time subsequently that evening check the valves, the cargo line valves of the ship?

A. Yes. Bob Hicks wanted me to check them right away and I wouldn't do it until Mr. Stevens got there. I wanted Bob Hicks to come down in the pump room with me, and he wouldn't go.

Q. Who was Mr. Stevens?

A. Supervising engineer of the Keystone Shipping on the West Coast while they were receiving these new ships out of Swan Island, and he was in Seattle at the time.

(Testimony of A. L. Hilligos)

Q. Did Mr. Stevens arrive some time after that time?

A. He arrived after I did.

Q. And in company with him, did you go down into the [230] pump room? A. Yes.

Q. Did anybody else go down with you?

A. I don't recall.

Q. What did you do down there?

A. Well, we checked the valves to see if they were set right, which they were. We never touched a valve in the pump room.

Q. Did you then check any valves on deck?

A. We went over all the valves on deck.

Q. I will ask you if you checked, yourself personally, the No. 5 cross-overs at that time?

A. Absolutely. They were still chained and sealed off.

Q. And did you test the No. 5 with a wrench at that time?

A. No. The way they were chained off, why, you couldn't open or close them with a wrench unless you took the chains off.

Q. Were the No. 5 cross-over valves shut tightly at that time?

A. Yes. They were shut very tightly.

Q. How about the No. 7?

A. The same way. I said you couldn't put a wrench on to open or close them, but they were shut tight originally and chained off and I didn't break the seals to check them. [231]

Q. Now, did you stay on the vessel that night?

A. Until midnight.

Q. Was pumping resumed some time later?

A. Yes. If I recall right it was resumed around between 9:00 and 10:00 o'clock.

(Testimony of A. L. Hilligos)

Q. What was done then?

A. Oh, I forget who it was, but they wanted certain ullage pumped out of a tank to wash the gangplank off, and we did, and started pumping both cargoes again and there was some commotion on the dock, and they said to shut down, it was contaminated again, so we did and we shut down a while longer and we started finally pumping straight diesel oil.

Q. You mentioned some commotion on the dock. Can you elaborate on that in any way? Did you observe anything on the dock? What do you mean by that?

A. Well, I am not familiar with Standard Oil docks, so I couldn't say, but I do know they had a hose crossed over from one pipeline to another, one header to another header and it seemed like when we were pumping for awhile, why, everything went fine.

I saw a fellow open a valve down on the dock, and a few minutes after that, we had contamination again. It is not my business to go on the dock and check to see that the valves are correct. I have got no business on the dock.

The Court: Did you determine what was the cause of the contamination? [232]

The Witness: Well, I think personally the contamination was ashore in Seattle. Somebody made a mistake ashore in Seattle. It wasn't on the ship. Either somebody made a mistake and opened the wrong valves, or they had the contaminated cargo in Seattle and figured it was a good chance to get rid of it.

Q. By Mr. Mack: Mr. Hilligoss, you were on the ship until midnight of the 23rd? A. Yes.

Q. You then left the Egg Harbor? A. Yes.

(Testimony of A. L. Hilligos)

Q. When did you come back?

A. 8:00 o'clock the next morning.

Q. And did you stay on the Egg Harbor then for any length of time?

A. I stayed on until it was finished discharging, and I think we finished discharging the following morning around 7:00 or 8:00 o'clock.

Q. That would be the discharge of all products from the boat?

A. Yes, sir.

Q. Mr. Hilligoss, during your experience as a pump man, have you ever seen valves blanked off with spectacles?

The Court: What do you call those?

Mr. Mack: Spectacles.

The Court: Don't you call them spectacle flanges?
[233]

Mr. Mack: Yes, spectacle flanges.

Q. By Mr. Mack: Have you ever seen blanked off with spectacle flanges, valves comparable to the 5 and 7 cross-over valves in any of the tankers upon which you have worked in discharging different grades of cargo?

A. No.

Q. When you worked for the Standard Oil Company of New Jersey, did their vessels carry different grades of cargo on which you were a pump man?

A. Yes. I was on some of the ships run out of the Gulf up north carrying as high as 10 different cargoes, and we never blanked off anything. It would be impossible to get the cargo out of the ship.

Mr. Mack: You may cross examine.

(Testimony of A. L. Hilligos)

Cross-Examination

By Mr. Hall:

Q. I show you the plat marked in this case as Libellant's Exhibit 9, purporting to be the cargo piping on the SS. Egg Harbor. Your testimony is that you left the Egg Harbor at Point Wells on the 23rd of April between 11:00 and 12:00 o'clock in the morning?

A. That is right.

Q. Your testimony is that at that time valves were set for discharging the cargo. Is that correct?

A. Yes.

Q. Which tanks were you going to unload the cargo from [234] first?

A. Well, I recall it was No. 8. That was the diesel.

Q. You then had the valves set for unloading the cargo of diesel in tank 8. Is that correct? A. Yes.

Q. Now, how about the gasoline? Where were you going to unload that? A. No. 2.

Q. Did you have valves set for unloading cargo from any other tanks? A. Absolutely not.

Q. Now, you were going to unload the diesel through the line which is marked on this plat as line C, were you not?

A. No. We was going to unload through this line here.

Q. You are now pointing to the line B. Is that correct? A. That is correct.

Q. If I understand you correctly, then, the diesel from tank 8 was to be unloaded through line B. Is that correct?

A. That is correct. Wait a minute, no. It would be unloaded through this line here.

(Testimony of A. L. Hilligos)

Q. You are now pointing to line A. Is that correct?

A. Yes.

Q. Then, your testimony is that the diesel from tank [235] 8 was to be unloaded through line A. Is that right?

A. Yes.

Q. And at the same time you were going to unload gasoline from tank 2 through line C. Is that correct?

A. Yes. No, this line here.

Q. How long would it take you to unload the entire cargo in tank 8?

A. Approximately 6 hours.

Q. How long would it take you to unload the entire cargo from tank 2?

A. The same thing, 6 hours.

Q. When did you set these valves?

A. About 10:00, just before I went ashore.

Q. About 10:00 o'clock?

A. Yes.

Q. Then you went ashore shortly after 10:00 o'clock?

A. Well, by the time they got the gangway out, I think it was around 11:00.

Q. Did you leave any instructions as to changing of the valves for the unloading of the other tanks?

A. Yes, sir.

Q. Who was to do that unloading?

A. My second pump man.

Q. Your second pump man?

A. Yes.

Q. You left it for him to make the change when the [236] change was required for the purpose of unloading cargo from some other tank?

A. The man is a senior officer.

Q. Wait a minute. Will you answer that question if you understand it, please?

A. May I have the question read?

(Question read.)

(Testimony of A. L. Hilligos)

Q. By Mr. Hall: Will you please answer that question yes or no, and then you may explain it.

A. No.

Q. You didn't leave it to him? A. No.

Q. Who did you leave it with?

A. The chief officer.

Q. His name? A. Morris.

Q. Did you leave it with anybody else besides Morris?

A. No.

The Court: What did Morris have to do with it?

The Witness: He is senior officer in charge of discharging cargo. We only assist him. I tell my men, "You do this and you do that," but if the senior officer in charge wants to change it, he has got the authority to change it.

The Court: Didn't you leave any instructions with your assistant regarding switching over to the other tanks?

The Witness: I told him to switch over, yes, from No. 8 [237] to 7.

The Court: For instance, I understand from tank 8 you would pump from this line marked A?

The Witness: Yes.

The Court: How would that diesel oil finally reach your outlet? Just trace it for me.

The Witness: These master valves were closed. It would come up through here, down through here, into the cargo pumps, and finally up through this riser.

The Court: Now, about No. 8, where would it go?

The Witness: It would come straight back through here and through this pump here and eventually come up through this riser here (indicating).

(Testimony of A. L. Hilligos)

Q. By Mr. Hall: No, before you left to go into Seattle on the 23rd of April, you say you checked the valves? A. Yes, sir.

Q. All over the vessel? A. Yes, sir.

Q. When you say "checked", you mean you looked at them?

A. I do not mean I looked at them. I checked them.

Q. What do you mean by "check"?

A. Put a wrench on to make sure they are closed except the ones I want to be open.

Q. On this plat, Libellant's Exhibit 9, there are a lot of little circles shown on what purports to be the deck [238] of the vessel, on the upper half of the plat?

A. Yes.

Q. Now, before you left the vessel that morning, then, your testimony is that you put a wrench on those valves? A. That is right.

Q. All of them? A. That is right.

Q. But you didn't put a wrench on the valves in the cross-overs in the No. 5 tank, did you?

A. It was impossible. I put one on them in Pedro and made them tight and when I had them chained, you couldn't open or close them unless you broke the seal.

The Court: How do you account for the fact that they were found partially open?

The Witness: That is something I don't know.

The Court: You knew about that, didn't you?

The Witness: I didn't know about it until today.

Q. By Mr. Hall: What time did you return to the vessel from Seattle on the evening of April 23rd?

A. Approximately 6:00 o'clock, or a little after 6:00.

Q. Was there any discharging going on then?

A. No.

(Testimony of A. L. Hilligos)

Q. Were both Mr. Stevens and Mr. Hicks there at the time?

A. No. Mr. Hicks was there and Mr. Stevens arrived shortly after I did. [239]

Q. Now, as I recall your testimony, you said they started to discharge both cargoes again. Is that correct?

A. That is right.

Q. When did that occur?

A. Oh, I couldn't give you the time on it, but it was, I would say, around 8:00 o'clock.

Q. How long did they discharge two cargoes when they recommenced before they stopped again?

A. That is hard to say, too. It was approximately a half hour. I wouldn't say that was the exact time, because it has been so long ago.

Q. It might have been five minutes?

A. No, no. It was longer than that. We pumped about 10 or 12 feet out of the tank.

Q. What's that?

A. I would say we pumped about 10 or 12 feet out of the tank. It was about a half hour anyway.

Q. Were they still pumping from tank 2 and tank 8?

A. Tank 8 and tank 4.

Q. Oh. There had been a change from tank 2 to tank 4 then? A. Yes.

Q. When did that change occur?

A. When they wanted to wash out the gasoline line in the No. 4 tank.

Q. Were you there when that change occurred? [240]

A. Yes.

Q. What time did it occur?

A. It occurred just before we started pumping.

(Testimony of A. L. Hilligos)

Q. Had tank 3 been emptied?

A. That is something I couldn't say. I don't remember.

Q. Why did they pump from tank 2 to tank 4?

A. I couldn't tell you. It was talked over among Stevens, Hicks, our mate, and those two gentlemen there. They were the ones who decided why it should be done that way.

The Court: You say there was a commotion. What do you mean by that? You said there was a commotion, somebody said there was contamination and to shut down again. Is that the commotion you meant?

The Witness: We were pumping for awhile and I heard somebody holler down on the dock to open something up, and I looked over and they had a hose from one pipe line to another, and I saw this fellow open the valve and it wasn't but a few minutes after that that we had contamination again.

The Court: Well, did you see Mr. Hicks down there?

The Witness: No. He wasn't down there. He was aboard the ship.

The Court: He didn't go down there at any time?

The Witness: On the dock, no.

The Court: He didn't go down to see whether there was [241] contamination or not?

The Witness: Not to my knowledge. I couldn't say. I was on deck. He could have because he was with these gentlemen here.

The Court: So far as you know, he observed the contamination himself?

The Witness: Yes, so far as I know.

The Court: Proceed.

(Testimony of A. L. Hilligos)

Q. By Mr. Hall: What time of the day was that when that commotion occurred?

A. Well, it was shortly after 8:00 o'clock, after we had started pumping.

Q. Was it dark? A. Yes.

Q. When you say you saw somebody opening a valve, describe to us where that valve was.

A. About 25 to 30 feet from where I was.

Q. Was it on a dock header?

A. Yes, it was on a dock header.

Q. Whereabouts on the dock header?

A. Well, the pipeline runs paralled with the dock. There was a header coming up off a tee.

Q. I asked you where it was on the header. You said the valve was on the header. Whereabouts on the header was it? A. In the middle of the header.

[242]

Q. Which header was it, the one connected with the gasoline hose or the diesel hose?

A. That is something I couldn't tell you. I told you it was a hose hooked up from one pipe line on the dock to another pipe line on the dock, and I am unfamiliar with Standard Oil docks, so I can't tell you what line it was connected to.

Q. Now, when you say a hose connected from one line to another, you mean hose and not pipe?

A. Yes.

Q. It was a hose on the dock? A. Yes.

Q. Leading from one pipe to another pipe?

A. Yes.

Q. Where was the valve in the hose, whereabouts in the pipe? A. In the pipe line in the header.

(Testimony of A. L. Hilligos)

Q. Did the hose lead from the header or from some pipe to another pipe?

A. Well, I can see you are very unfamiliar with pipe lines, but a pipe line—

Q. You enlighten me, then.

A. A pipe line has what I call a header. It has a tee coming off, a valve, an ell, a header, and a hose was hooked up to the header to the valve to the tee in the pipe line. [243]

Q. Where did the hose go?

A. To another header.

Q. On the same dock?

A. Yes, approximately 10 or 12 feet away.

Q. Did you see any hoses connected with headers leading to the vessel? A. Yes.

Q. Were they the same headers that you have been talking about in connection with those hose from one pipe to another? A. No.

Q. Where were you when you saw all this?

A. Standing up on deck looking right down on them.

The Court: Did you make any comment?

The Witness: Yes, I made a comment.

The Court: To whom?

The Witness: Three or four people standing around there. I don't know who they were.

The Court: Did you make any comment to the men that were connecting up the two lines?

The Witness: Yes. I asked them what they were doing.

The Court: What was the answer?

The Witness: They said, "Well, just our regular gas line." That is all that they said.

(Testimony of A. L. Hilligos)

The Court: Did you make any comment at that time that the contamination was being caused by the way they were con- [244] necting up their pipe line?

The Witness: Yes.

The Court: To whom?

The Witness: These gentlemen was standing there, and my big bosses was standing there, and I said, "I think it is coming from the tanks off shore there."

The Court: When you speak about the header on these pipe lines, you mean that portion to which they coupled on the hose to their pipe line?

The Witness: Yes, sir. That is my definition of a header.

The Court: If it was in a garden, you would call it the faucet?

The Witness: Yes.

The Court: The same thing as coupling the hose together?

The Witness: Yes, sir.

The Court: Did you notice whether there were two couplings there or just one?

The Witness: Where it came up from this pipe line that I am looking at, why, it was down the dock about 15 or 20 feet, and the Standard Oil at Point Wells, I guess there is four or five pipe lines on the dock.

Well, I never went down the dock and traced it because, as I say, it is none of my business. I have got no authority on the dock.

The Court: But you had some responsibility in that [245] respect? You knew that as soon as contamination developed the first thing they would do would be to claim that it had been contaminated aboard, didn't you?

(Testimony of A. L. Hilligos)

The Witness: Yes.

The Court: What did you do to protect yourself from the responsibility for the contamination? Did you do anything? Did you just say it was their business and let them alone?

The Witness: No. I mentioned it to Stevens.

The Court: All right. Now, the hose from the deck hooks into a pipe line like two pencils together?

The Witness: Yes, sir.

The Court: And there were two of those coming out?

The Witness: Yes.

The Court: And you claim that there was a hose connecting the two?

The Witness: No, farther down the dock. These pipe lines all run down the dock parallel, and some of them go down underneath the dock and into tanks, and further down they will go to more tanks, and down the dock about 40 feet from where our ship's *horses* was connected to the dock pipe line, there was another hose crossed from one header to another header across the pipe lines. That is where this fellow opened a valve. I saw him open a valve and close it.

The Court: You have learned that the cross-over valves on tank 5 were found partially open? [246]

The Witness: So I heard today, yes, sir.

The Court: And you know that the mate was discharged over this, don't you?

The Witness: Yes.

The Court: Yet you don't know how those valves came to be loosened?

The Witness: No, because I and Captain Hogstrom in Pedro set those valves up tight with wrenches and put

(Testimony of A. L. Hilligos)

chains on them, and when I finally broke the seals in El Segundo after the round trip, it took three men on wrenches to open them. So, that is all I can say.

The Court: That is all.

Mr. Hall: That is all.

Mr. Mack: I have a few more questions.

Re-Direct Examination

By Mr. Mack:

Q. During discharge operations on the Egg Harbor there, was any record kept by the vessel of ullages in the vessel's tanks at different intervals? A. No, sir.

Q. In other words, you started discharging and no record was kept at any time of how much was in each of the tanks?

A. No, except like when I am pumping now, we are on the South Pacific run, and when I finish a tank, we take a record of it. [247]

Q. You take a record of the time?

A. Yes. However, where we are pumping out one cargo at one dock, we never take no time except the time it started and the finishing time.

Q. When discharge of both products was commenced there within a short time of one another on the afternoon of the 23rd, was one pump discharging one product each?

A. Yes, sir.

Q. And on the Egg Harbor, what is the approximate capacity of the pumps: that is one pump?

A. Well, the pumpers say 3,000 barrels an hour, but the best I have ever been able to get out of them is around 2,800 barrels an hour.

Q. That is the maximum that you developed in your pumping experience? A. That is right.

(Testimony of A. L. Hilligos)

Q. Would that apply equally to gasoline and diesel furnace oil?

A. Yes, up to a certain pressure. Of course, the more pressure built up, the slower you are going to pump.

Mr. Mack: I think that is all.

The Court: There were a couple of spectacle flanges there that were open, were they not?

The Witness: Yes, sir.

The Court: Why were they not closed?

The Witness: Well, I can explain that to you. These [248] are pipe lines coming into the pump room. Your spectacles are here. Your pipe lines go here. Then your pipe lines continue on. Here is your sea cocks. So, you got a line running clear across the pump room. You have two valves, one here for what you would call the No. 3 line and one for the No. 2 line and No. 1 for the No. 1 line. They are individual valves.

The law will not let you blank them off, for some unknown reason. I don't know why.

The Court: Do you know why those flanges were put in there?

The Witness: I could never figure that out, sir.

The Court: You are familiar with the rulings now to the effect—

The Witness: They still have to be in there sealed.

The Court: But it is the requirement now on these government tankers that these flanges are to be set closed. Are you familiar with that ruling?

The Witness: No, I am not, but we have got the same on this ship here. Last night I was pumping out a No. 9 tank with those, and not with the No. 3 pump.

(Testimony of A. L. Hilligos)

Q. By Mr. Mack: Now, you are talking about the present ship you are on now?

A. Yes. That shows us they are not in there for absolutely any good, because I was coming right back here from another line. [249]

Q. From what you say, Mr. Hilligoss, when the spectacle flanges in the pump room are set, you can still pump around them from another line?

A. I can still go around through them.

Mr. Mack: That is all.

The Court: That is all.

(Witness excused.)

The Court: Any further evidence, gentlemen?

Mr. Mack: I want to ask Mr. Kilbourn a few more questions as my own witness.

The Court: I didn't continue this to give you a new start.

Mr. Mack: This is the end, if the Court please.

FRED R. KILBOURN,

called as a witness by and on behalf of the respondents, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Mack:

Q. Mr. Kilbourn, prior to the arrival of the Egg Harbor up there at Point Wells on April 23rd, 1943, had you had any experience with contaminated cargoes from vessels?

A. Any experience with contaminated cargoes from vessels?

(Testimony of Fred R. Kilbourn)

Mr. Hall: I submit that is immaterial, if the Court please. It is raising collateral issues. [250]

The Court: I think within a specified period—the only thing we are interested in was April. I presume your question was directed to the witness to show that the tanks were already contaminated?

Mr. Mack: No. My idea was to show if they had any experience with it before, and charge them with knowledge of what they should do when they first learned of a contamination coming off the vessel.

The Court: You may answer the question.

The Witness: Yes. I think we had one about 1939. There was a cargo of road oil come up, and if you understand road oil MC2, it is a cut back, and SC2 is shipped up. MC2 is put in an SC2 tank, but the master gauger was not directed until we got information from the home office some three days later that the SC2 was shipped up north and the MC2 or vice versa. However, that was something put in the wrong tank. That was a contamination caused by putting one on top of the other.

The Court: Did you ever have a condition where a tanker arrived and the product was contaminated?

The Witness: No, sir. I never had one.

Q. By Mr. Mack: Not prior to this occasion?

A. No.

Q. But in your experience in the oil industry you have heard of that happening, haven't you?

The Witness: Of a boat being contaminated? [251]

Q. Yes. A. No. I never have.

Q. That is prior to the Egg Harbor?

A. No. The first one I run into was the Egg Harbor.

(Testimony of Fred R. Kilbourn)

Q. Now, can you give us an idea, Mr. Kilbourn, on this plat of your layout up there, how far it is from the dock over to the gasoline tanks 61 and 62?

A. Oh, I would say I imagine it is 2500 feet, and maybe 3,000.

Q. The gasoline lines that are depicted on here in red, are those underground or surface? A. Surface.

Q. All surface?

A. All surface except they are under docks here, and come on the surface all the way. We have all of our lines on the surface so we can detect any leaks.

Q. With reference to the blue lines indicated on this plat No. 1, how far is it from your dock up to tank 8?

A. Oh, I would say it is around 7 or 8 feet.

Q. How far to tank 41?

A. Oh, I would say another 7 to 8 feet. It is kind of a round about way.

Q. Are those diesel lines surface or underground?

A. The only place it is underground—it is all on surface except—no, by George, they are all above ground.

Q. What is the terrain there? Is that all level or [252] on hills?

A. No. It is dredged land. It is sandy dredged land.

Q. Mr. Kilbourn, is my understanding correct that prior to discharging operations commencing from the Egg Harbor, you had taken no samples from shore tank No. 8? A. No samples from shore tank No. 8.

Q. And you had made no tests from shore tank 8?

A. No.

The Court: You say you had been making regular deliveries?

(Testimony of Fred R. Kilbourn)

The Witness: Yes. Two days prior, we had finished pumping those tanks. We pumped down to what we call bottom.

The Court: Those were storage tanks and you continued to use them and fill the orders of your customers from those tanks?

The Witness: That is right.

Q. By Mr. Mack: The same is true on the samples or tests not being taken before discharge relative to gasoline in shore tank 62? A. That is right.

Q. Now, is my understanding correct that from the time you or the men under your supervision first started to take samples of the diesel which continued, as I understand it, all through the night of the 23rd and the following day, they never detected from any of the samples or tests that they made that anything was wrong with the diesel? [253] A. That is right.

Q. Now, have you changed that method of sampling and testing since the Egg Harbor?

A. No, but we do—we go aboard the boat and take samples of what we call “outside boats” since the Egg Harbor and make flash tests of the diesel that is in the tanks of the boats that come in there but we still control the dock deliveries by sample by vision.

Q. Well, what was the purpose in taking the samples then as you did after discharge commenced relative to the diesel?

The Court: You only put your hand on a hot stove once, and you learn after that not to put it on again, counsel.

Mr. Mack: That is true, your Honor, but I have been trying to figure out if the samples didn't help them any, what was the purpose in taking them?

(Testimony of Fred R. Kilbourn)

The Witness: May I say on that that the gasoline is a slightly different color than the diesel and that was the only thing we were worrying about. We watched to see if there was any chance of gasoline going in there and we could catch it, but in making a slight mixture as they did in that case, the quantity of gasoline wouldn't show up in the diesel.

Q. By Mr. Mack: So far as the gasoline was concerned, you readily detected the change in color?

A. Yes. A larger percentage of diesel went into the gasoline than did the gasoline into the diesel. It was quite [254] brown. It looked almost like diesel.

Mr. Mack: That is all.

Cross-Examination

By Mr. Hall:

Q. Did you at that time have a hose on the dock for the purpose of connecting any of these pipe lines on the dock?

A. I don't know whether we had one at that time or not, but we often do have a hose from what we call our 16-inch line to our 8-inch line in case we are loading a small cargo vessel from that dock line. Then, we put it from one header to another on our gasoline line. We may put a line across here. There are two gasoline lines there. They are absolutely separate. We can go around here to a vessel down here, but there is so much back pressure running through the pump that we oftentimes put a cross-over line from one header to the other down here to take the cargo down here.

Q. Then that cross-over by means of the hose would be from one gasoline to another gasoline line?

A. Yes.

(Testimony of Fred R. Kilbourn)

The Court: What would prevent you from using that same *house* to connect up the diesel oil with the gasoline?

The Witness: That is something we watch out for. There is a decided color in the header.

The Court: It is the same size pipe?

The Witness: Yes, the same size pipe, 6-inch header but with a red head with gasoline and a decided green head [255] for diesel, and at this point there is no diesel header near that gasoline cross-over valve.

The Court: How far is the one—

The Witness: I imagine it was 30 or 40 feet. That is used quite often. For that matter, we leave the hose there in case of a boat coming in so we can pump from this big cargo line. We can draw up here in case of a little boat coming in and we could run it up through the pump house. However, I don't remember any hose there at this time.

The Court: Were you there in the evening at the time that the pumper returned and they started up the second time?

The Witness: I was there until way after midnight.

The Court: Did you see any connecting hose used between the lines?

The Witness: I don't know whether the hose was there, because we often have it there.

The Court: Did you see it in use?

The Witness: I don't remember.

The Court: You would know whether it was being used to connect up one line with another?

The Witness: I would, but I can't remember this special one.

(Testimony of Fred R. Kilbourn)

The Court: I know, but you heard the pumper's testimony. What do you know about that fact? He said he saw somebody, and in your presence, make that connection that caused the contamination. [256]

The Witness: The connection would be made prior to the pumping of the boat. It would remain there until the boat got through pumping, if there was any connection made.

The Court: You couldn't make it while the pumping was going on?

The Witness: Yes, if we turn off a valve, but that was on at the time.

The Court: This witness has testified that he saw some of your men deliberately connect up the diesel line with the gasoline line.

The Witness: That is wrong.

The Court: Do you know that to be a fact?

The Witness: Yes, I know that to be a fact.

The Court: How do you know it?

The Witness: It wouldn't affect the test of contamination if it was connected up that way, your Honor.

The Court: You mean the test was taken before it reached that point?

The Witness: Yes.

Mr. Hall: I was about to ask him that, but I think it was clear that the tests were taken at the end of the ship's hose before it reached the first header on the dock.

The Witness: Yes.

Q. By Mr. Hall: And those were the tests taken when they resumed pumping of the double cargo of both products at 9:30 or whenever it was? [257]

A. That is right.

(Testimony of Fred R. Kilbourn)

The Court: And you make the test at the point where your hose couples on to the ship's connections?

The Witness: We make it where our hose coming from the ship down to the header before it goes into the pipe line, and that is as the gas comes directly from the boat, before it gets into our pipe line.

The Court: And there is no way to make a connection there with another line?

The Witness: No, absolutely not. The connections are made 60 to 70 feet from these risers as they come off the boat.

The Court: Any further questions?

Mr. Hall: No.

Mr. Mack: No further questions.

The Court: That is all.

(Witness excused.)

The Court: Any further evidence, gentlemen?

Mr. Mack: The respondent has no further evidence.

Mr. Hall: The other day your Honor asked if we would prepare a statement with respect to attorney fees. I have handed counsel a copy of this statement, and I believe that he will stipulate that if a member of our firm were called, that member would testify in accordance with this memorandum which I have now filed with the clerk, which is labeled Schedule C. [258]

Mr. Mack: Of course., I was handed a copy of this statement by Mr. Hall just before the court convened this afternoon and looked it over hastily.

I will stipulate that if Mr. Hall, who is a member of their firm, were called, he would so testify subject, however, to my objection to any evidence relative to attorney fees.

The Court: Well, that is a point of law that we will settle afterwards.

Mr. Mack: I am just making the objection for the record, if the Court please.

The Court: The Court will take that into consideration.

Now, Mr. Mack, you were going to check the figures on Schedules A and B so that you would be in a position to ascertain whether you have any objection to the method of calculation set forth.

Mr. Mack: I looked those over, if the Court please, and I would want to ask Mr. Hall a couple of questions about them because it wasn't quite clear to me the way they were figured. In other words, I didn't know, and what I am interested in is whether those are actually the accountant's figures as to costs on the reduced amounts, or whether it is a percentage proposition. I wasn't clear.

Mr. Hall: Those are the accountant's figures. The only percentage figure, as I understand it, is in the item with respect to handling charges at Point Wells in Schedule B, which is an item of \$335.00 on this schedule, and in our [259] stipulation of December 6, 1944, it was \$400.00 odd dollars. Now, that has been prorated.

All other items on Schedule B are accountant's figures kept in the same way that the group figures were computed in paragraph 7 of our stipulation of December 6th.

Mr. Mack: I have been all over those figures in great detail before the trial, and on Mr. Hall's statement that that is the fact I am willing to agree to it, namely, that the proper witness, if called, would testify to those figures there in Schedule B.

Mr. Hall: Will that be given an exhibit number, if the Court please, this Schedule C which I have just handed in?

The Court: It may be next in order.

(The document referred to was marked Libelant's Exhibit 15, and was received in evidence.)

[LIBELANT'S EXHIBIT NO. 15]

SCHEDULE C

STATEMENT RELATIVE TO THE SERVICES
RENDERED BY THE FIRM OF LAWLER,
FELIX & HALL, AS ATTORNEYS FOR LI-
BELANT IN STANDARD OIL COMPANY OF
CALIFORNIA V. UNITED STATES OF AMER-
ICA, ET AL—FEDERAL DISTRICT COURT
NO. 3490-BH

The services of libelant's attorneys were rendered over a period beginning March 6, 1944, on which date information that the vessel SS "Egg Harbor" had arrived or was about to arrive at the Port of San Pedro, necessitated that a member of the firm devote his exclusive and prompt attention to the filing of a libel in order that the suit might be commenced while the vessel was in port and within the jurisdiction of the Court.

The libel was prepared on March 6 and 7, 1944. Filing and arrangements for service of process was accomplished on March 7, 1944. Thereafter during each month prior to trial, except June 1944, services were performed in the nature of trial preparation by either John M. Hall or Marcus Mattson, both members of the firm.

Prior to the commencement of the trial the time spent upon the case was 268¼ hours, exclusive of the time spent in telephone conversations and in the preparation of correspondence. Such time was taken up with preparation of pleadings and other papers, conferences with counsel for respondent and with witnesses and others

(Libelant's Exhibit No. 15)

having knowledge of the facts, examination of correspondence received and examination of authorities.

While the necessity of presenting certain evidence through testimony of witnesses was obviated by stipulation, it was necessary prior to obtaining said stipulation to obtain and have available a great deal of documentary matter in order that a proper basis for such stipulations could be shown to exist.

The preparation and filing of an extensive pre-trial Memorandum for the guidance of the court was undertaken in view of the questions of law involved. While the basic principles involved cannot be said to be new or novel, their application to the case was not entirely simple because of the lack of decisions pertaining to the factual situation which gave rise to libelant's claim. In addition to such Memorandum, an additional Reply Memorandum was prepared prior to trial.

Preparation of the factual portion of the case required trips to San Pedro and El Segundo.

A tabulation of the total time of $268\frac{1}{4}$ hours spent prior to January 30, 1944 discloses the following:

Preparation and filing of Libel in Personam	5½ hours
Conferences	28 "
Research and examination of authorities	234¾ "
	<hr/>
	268¼ hours
Number of telephone calls	60
Number of letters	47
Number of court appearances prior to trial	2

[Endorsed]: No. 3490-BH Adm. Std. Oil Co. vs. U. S. A. Lib. Exhibit No. 15. Filed Feb. 2, 1945. Edmund L. Smith, Clerk; by M. E. W., Deputy Clerk.

Mr. Hall: I desire, if the Court please, to file a supplemental memorandum of authorities dealing with three points. First, that the Charter party must be strictly construed against the United States, and under that point I call your attention to the fact that the form of this Charter party is prescribed in the Federal Register. If the Court desires that, I have the number of the Federal Register here and I will hand it in.

The second point in this memorandum is my argument with reference to paragraph 7 of the Charter party and I ask consideration of a further contention made with respect to [260] paragraph 7 over and above the contentions which I offered in argument the other day.

The third point has to do with the question of attorney fees and the propriety of an allowance against the United States on account of attorney fees. Under that point I have called attention to the authority of the War Shipping Administration under the Act and under the Executive Order of its creation and to comment upon that authority in two opinions of the Attorney General of the United States which I think have a bearing upon the general question of the allowance of those attorney fees.

The Court: I haven't read it all, but I notice here you have given a statement as to the time spent in this case, but is there going to be any testimony as to your opinion as to what is a reasonable attorney fee?

Mr. Hall: I would leave that with the Court.

The Court: But you must remember that I am just a country lawyer and my idea of fees differs considerably from those of you that live in a big city. If I allow attorney fees, I would be basing them on my experience as a country lawyer and it would be to your disadvantage.

I would like to at least have testimony or a stipulation that he would testify that a certain amount is in his opinion legal.

Mr. Hall: My testimony would be that \$9,000.00 would be a reasonable fee. May it be stipulated that if called I [261] would so testify, Mr. Mack?

Mr. Mack: Yes, so stipulated.

The Court: I presume you will want an opportunity to examine this supplemental brief?

Mr. Mack: And on that question of attorney fees, I haven't had much chance.

The Court: I will give you five days to submit any authorities that you desire to submit in reply. Pretty near everything else has been covered as we have gone along.

I appreciate the way in which both sides have presented their case freely and frankly, and the co-operation between counsel.

The Court has in his own mind most of the questions of law worked out, whether they are right or wrong. I have come to some rather definite conclusions of certain questions of law in this case and probably should make no comment until I have read the authorities. However, I can't figure out under what authority attorney fees can be obtained against the United States in view of the fact that this Act under which this proceeding is brought is strictly construed and the matter of allowing costs and interests is definitely stated.

Now, it seems to me that that expression is in there as a limitation of the authority of this court. Of course, you may have answered my comments in this statement or this

additional memorandum that you have filed, but your only authority to sue the United States, as we have proceeded in this case, [262] and jurisdiction to sue, is based upon Section 741 of Title 46. Now, you state that the Attorney General and the Shipping Board have made certain rulings in that respect in other cases?

Mr. Hall: I don't want to repeat anything I have in my memorandum, but for clarity in approaching the question, may I make this distinction? We are not asking for attorney fees as a matter of costs or as being included in the costs. We are asking for them as an element of damages. There is a very marked distinction between the two, I concede.

In this case the attorney fees should be awarded as part of the judgment because they are granted by the contract itself if there is a breach.

The Court: In other words, it is a part of the damages.

Mr. Hall: Yes, the same as a promissory note or a lease or something of that sort. We go from there to inquire as to the power of the War Shipping Administration to make this kind of a contract, to contract that if there shall be a breach, attorney fees shall be included, and I mention that authority in the memorandum I submitted.

The Court: I would like to have the Federal Register memorandum on that Charter Party agreement. I have it in my library but of course I haven't the citation.

Mr. Hall: I cite it in my memorandum. It is June 10, 1942, page 4386.

The Court: Is there anything further, then, gentlemen? [263] The matter will stand submitted, but I will allow you, Mr. Mack, five days to file any reply you desire to Mr. Hall's memorandum that has been filed today, and if you desire to file a reply to the one that he served on you within five days, you will have the same privilege.

Mr. Hall: Thank you, sir.

The Court: But we have used a lot of paper so far in this case, so I am not asking for it.

Very well.

[Endorsed]: Filed Jul. 16, 1945. [264]

[Endorsed]: No. 11126. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Standard Oil Company of California, a corporation, Appellee. Apostles on Appeal. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed August 13, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11126

UNITED STATES OF AMERICA,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT
INTENDS TO RELY ON APPEAL

Appellant, United States of America, intends to rely upon the points stated in its Assignment of Errors on appeal herein, which Assignment of Errors appears at page 69 of the typewritten Transcript of Record as certified by the Clerk of the District Court, and appellant incorporates its Assignment of Errors and full contents herein the same as though fully set forth at length.

Dated: August 28, 1945.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

By A. F. Mack, Jr.

Proctors for Appellant

Received copy of the within Statement of Points on which Appellant Intends to Rely on Appeal this 28th day of August, 1945.

LAWLER, FELIX & HALL
JOHN M. HALL

By John M. Hall

Proctors for Appellee

[Endorsed]: Filed Aug. 30, 1945. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND REQUEST FOR USE OF
CERTAIN EXHIBITS IN ORIGINAL FORM

It Is Hereby Stipulated between appellant and appellee, through their respective proctors, that the exhibits hereinafter specified may be used and considered by this Court in their original form, which exhibits cannot very well be printed, namely:

(A) Libelant's (appellee's) exhibits as follows:

- 1) Exhibit 1—Layout at Point Wells, Washington.
- 2) Exhibit 8—Cargo Plan of S. S. "Egg Harbor".
- 3) Exhibit 9—Piping Arrangement.
- 4) Exhibit 10—Wooden Model of Spectacle Flange.

(B) Respondent's (appellant's) exhibits as follows:

- 1) Exhibit A—Smooth Log of S. S. "Egg Harbor".
- 2) Exhibit B—Rough Log of S. S. "Egg Harbor".
- 3) Exhibit C—Ullage Sheet, Voyage 2, S. S. "Egg Harbor".
- 4) Exhibit D—Ullage Street, Southbound Voyage, S. S. "Egg Harbor".

Dated: August 28, 1945.

CHARLES H. CARR

United States Attorney

ROBERT E. WRIGHT

Assistant United States Attorney

LILLICK, GEARY, McHOSE & ADAMS

A. F. MACK, JR.

By A. F. Mack, Jr.

Proctors for Appellant

LAWLER, FELIX & HALL

JOHN M. HALL

By John M. Hall

Proctors for Appellee

ORDER

It is so ordered.

Dated: August 31st, 1945.

FRANCIS A. GARRECHT

Presiding Judge

[Endorsed]: Filed Aug. 31, 1945. Paul P. O'Brien,
Clerk.